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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS, ET AL., *Appellants*,

vs.

WILSON CYPRESS COMPANY, *Appellee*.

REPLY BRIEF OF APPELLANTS ON APPELLEE'S MOTIONS TO DISMISS THE APPEAL.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors and Counsel for Appellants.

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Before receipt of briefs of counsel for appellee the briefs of appellants' counsel were in print, so that avoiding so far as possible any argument on the merits, a reply brief seems necessary.

To the motion to dismiss the appeal for failure to print the record a sufficient answer is found in the files of the Clerk's office. From the files it will be established that appellants' counsel within the time prescribed offered to deposit the cost of printing the transcript since the mandate of this Court on the former appeal, and requested the clerk to print this entire transcript.

The affidavits attached to appellants' motion that the Court hear the cause upon the six copies of the printed

transcript used on the former appeal shows that appellants have made every effort to comply with the Court's order made October 13, 1924.

Appellants are not responsible for the more than five years delay in getting the District Court to make a decree after the case was remanded, nor for the destruction of the twenty or more copies of the printed record filed on the former appeal.

We are strongly persuaded that the destruction of the printed records was due to the delay of the District Court to promptly render a decree, and that such delay was due to the fact that the learned District Judge realized that this Court had fallen into error, in its decree herein. As a District Judge he could not overrule this Court; as a learned and courageous judge he would not make a decree he knew would be contrary to the applicable law of the case, settled by repeated decisions of this Court in the Florida cases.

We are supported in this belief by the fact that within a few weeks after the District Judge turned this case over to Judge Bryan to decide he made a decree directly contrary to this Court's opinion in the case at bar.

See Sanchez v. Deering, 288 Federal text 415.

The same character of title, and the same confirmatory statutes were under consideration in the Sanchez case as in the Marcos case. In the Sanchez case the learned District Judge rightly held "that it is from the issuance of the patent that the title became perfect in this case, although the survey was made and approved in 1847."

As stated in our brief in support of Appellants' motion that the Court hear this case upon six copies of the printed transcript filed on the former appeal we feel that under the very peculiar circumstances under which this case stands appellee's motion to dismiss the appeal should be denied and appellants' motion should be granted.

REPLY TO COUNSEL'S BRIEF ON APPELLEE'S MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OR TO AFFIRM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

The contention of counsel for appellee is that this Court on the former appeal determined and settled all the federal questions in the case; that there were no federal questions before the Circuit Court of Appeals, and none decided by it, therefore no federal questions are brought to this Court under the appeal in this case; that the case when it was heard by the trial court did not involve a construction of the laws of the United States.

The first proposition of this sylogism is disproved by the record, and the last proposition is not sound.

The power to hear and determine, jurisdiction, by statute depends upon the existence of federal questions in the case made by the pleadings.

If it be that the Circuit Court of Appeals, by accident or design, did not decide any federal question, that did not make its decree final—if federal questions were properly before it for review. "In any case in which the judgment or decree of the Circuit Courts of Appeals is not made final *by the provisions of this title*, there shall be of right an appeal or writ of error to the Supreme Court," etc.

Section 241 Judicial Code.

The statute not the judges on the Bench confers or denies jurisdiction.

Printed copies of the transcript upon which the case was heard in the Circuit Court of Appeals are on file in this Court. From that printed record it will be seen that appellants sought a review of the District Court's decree upon questions of general law and State statutes as *controlled by Federal statutes.*

The 7th assignment of error is, "The Court erred in not finding and determining that until the decision made in the

Marcos claim, February 12, 1894, by the Secretary of the Interior a league square as used in the Act of Congress, approved May 23, 1828, was 4438.68 acres or less than 5000 acres."

The 8th assignment: "The Court erred in not finding and determining that until the decision of the Secretary of the Interior (February 12, 1894) the Marcos claim was an unconfirmed claim; that any survey of said unconfirmed claim in 1851 was not authorized by law, and not a segregation of the lands described in the patent until such survey was approved by the Commissioner of the General Land Office."

The 14th assignment: "The Court erred in not finding and determining as alleged in the bill of complaint that from May 26, 1831, to date of issuing the patent, June 26, 1895, the United States (and the State of Florida) had both the legal title and possession and right of possession of the lands described in the patent to the complaniants, and any occupancy of them by Powell-Sanford and Florida colonization company was a mere trespass."

The assignment numbered 14-e: "The Court erred in not finding and determining that the acts of possession, which the Court hold established an adverse possession prior to 1904 were acts done and had while the legal title was in the United States, and the State of Florida—and while the lands patented were claimed by the United States and the State of Florida."

The 15th assignment: "The Court erred in not finding and determining that as alleged on the bill, from May 26, 1831, to June 26, 1895, complainants were precluded from bringing any action for recovery of possession of the lands described in the patent, because during the whole of said period of time said lands were claimed adversely by the United States and held to be public lands of the United States, and school and swamp lands of the State of Florida."

The 17th assignment: "The Court erred in not finding and determining that the burden was on the defendant to estab-

lish that the plat of the Williams survey in 1851 was returned to the Register of the local land office by the Surveyor of public lands in Florida, and that the Surveyor General delivered to complainants ancestor a certificate of said survey, and in the absence of the filing with the register of the local land office of said plat of the Williams survey, the Norris survey in 1845 of the lands patented, as public lands was controlling on the complainants and their ancestor as to where the title to said patented lands rested, prior to the decision of the Secretary of the Interior, February 12, 1894, that the Marcos claim was a confirmed claim."

The 30th assignment: "The Court erred in holding complainants in laches in regard to the land involved, in face of the statute prohibiting and precluding claimants from taking possession, attempting to take possession or survey the property 'until authorized by law,' under penalty of forfeiture of all right, title and claim, and which in effect extended to any action for recovery of same, until allowance of the grant by the proper department of the United States," etc.

The 16th assignment: "The Court erred in not finding and determining that the special provisions of the Act of Congress approved February 8, 1827, applied to the survey of the lands patented to complainants, and that the general statutes relating to public surveys did not control."

The 19th assignment: "The Court erred in being controlled by the dictum found in the opinion rendered by the Supreme Court, that confirmation by Congress of the inchoate floating concession made by Spain to Marcos to the extent of a league square, 'left nothing to be done, but to segregate the land by a survey,' and in not finding and deciding that when the grant was confirmed to the extent of a league square the confirmee was required before May 26, 1831, to relinquish to the United States all of the 5500 acres in excess of what was a league square, as used in the act of Congress of May 23, 1828, according to the then

holding of the Land Department and the Supreme Court."

The 20th assignment: "The Court erred in being controlled by the dictum found in the opinion rendered by the Supreme Court that 'The United States has done no more than recognize the title derived from Spain, and as derived from Spain,' and in not finding that the United States limited its confirmation of the 5500 acres granted to Marcos to confirmation to a tract of 4438.68 acres to be selected out of the granted lands by the confirmee before May 26, 1831, and that until February 12, 1894, complainants and their ancestor were not authorized to take possession of any particular lands, until the 4438.68 acres had been lawfully segregated from the grant made by Spain, if the same could be located."

Pages 1134-1142 printed transcript, filed herein, Case 4053, United States Circuit Court of Appeals, Fifth Circuit.

Enrique Del Pozo y Marcos, *et al*, vs. Wilson Cypress Company.

CONSTRUCTION AND APPLICATION OF FEDERAL STATUTES REQUIRED.

Although these federal questions were pressed upon the attention of the Circuit Judge who tried the case, and upon the Circuit Courts of Appeals, both courts refused to give them any consideration whatever.

Surely a deliberate disregard by the Court of Appeals to consider the Federal questions made in the pleadings is reviewable by this Court.

It may be true that both the District Court and the Circuit Court of Appeals decided this case upon questions of general and local law, but it is equally true that complainant's case as made by their bill, and argument required a consideration and construction of federal statutes, set out in the bill and urged in brief and argument before both courts.

It can not successfully be contended in this Court that the appeal of right given by the act of Congress can be de-

feated by deliberate refusal or failure of either the trial court or the Circuit Court of Appeals, or by both courts, to consider and determine the contentions of litigants based on federal statutes.

Counsels' brief, page 22, says: "The court below treated these questions as already determined and practically formed no part of the record for further determination or decision."

It is because both courts below so treated the federal questions that we are here by appeal as of right.

If the Circuit Court of Appeals may arbitrarily refuse to consider and determine the federal questions made by the pleadings of litigants, it will be unnecessary to enact further statutes, to clear this Court's docket. Appellants' contention is in fact the contention that a majority of the judges of that Court may nullify the Act of Congress under which this appeal was taken.

The Circuit Court of Appeals was asked to determine appellants' case under a patent from the United States, which recites that it was issued under the act of February 8, 1827, and under the act of May 23, 1828.

The act of February 27, 1827, is not mentioned in the former opinion of this Court, although this act and the Missouri Act of May 26, 1824, expressly extended to the Territory of Florida, were and remain controlling of the issues made by the pleadings.

Manifestly this Court's opinion did not withdraw from the consideration of the trial court and from the Court of Appeals federal statutes not mentioned in its opinion.

In its opinion this Court said: "Appellants contend that the survey of 1851 was of no effect unless and until approved by the Commissioner of the General Land Office. This contention has no support in any statute or regulation that was in force at the time. The confirmatory act of 1828 and the act of June 23, 1848, are both silent on the

subject, and *in the absence of some applicable special provision* the general statutes relating to public surveys shall control."

The court overlooked the special statute which existed and controlled—the act of February 8, 1827, an act which vested in the Surveyor General of the Territory of Florida judicial powers.

See letter of Commissioner of General Land Office to the Surveyor General of Florida, dated February 26, 1827, found on page 863 of Volume 2, Public Land Laws, 1838 edition.

Extracts from this letter are printed in our brief filed herein, page —. Also on p. 18 appellant's brief Sanchez v Doering Co.

See also letter from the Commissioner to the Register and Receiver of Florida, dated June 6, 1828, printed on page 734 of said Public Land Laws.

Right and justice required the Circuit Court of Appeals to consider and apply this controlling statute. Acts of Congress in identical terms had been construed in the highest Court of Alabama and Louisiana. The cases are in the briefs submitted by appellants in the Circuit Court of Appeals, and will be submitted to this Court on its hearing on the merits.

Counsel in their brief say: "We submit, therefore, that there were no federal questions in the case before the United States Circuit Court of Appeals, and none decided by it," etc., page 19.

"An appeal has now been taken to this Court from the decision of the United States Circuit Court of Appeals to review the decision of that court on questions arising purely upon the evidence and upon local law," page 23.

ONE STATEMENT OF FACT SUFFICIENTLY DISPROVES COUNSEL'S CONTENTION.

Anticipating the defense of adverse possession and laches appellants' bill alleged that by the express terms of the act of March 1, 1807, extended to the Territory of Florida, they were prohibited from taking possession of the lands described in the patent under penalty of forfeiture of their title or claim thereto.

See Laws of the United States Respecting Public Lands.

In its opinion this Court recites this allegation of the bill, but failed to apply it, or to make any determination of whether or not this statute excluded appellants' ancestor from the lands determined by Robert Butler, Surveyor General, to be public lands of the United States.

DEFENDANTS IN THEIR ANSWER DENIED THIS ALLEGATION OF THE BILL.

The trial court wholly failed to consider the issue made by the bill and answer and supports its finding that complainants are guilty of gross laches by a statement that for more than 50 years appellants had failed to pay taxes on the land, etc.

This action of the trial court was assigned as error on the appeal to the Circuit Court of Appeals and that Court's attention was specially directed to the charge given the jury by Judge Bronson in the case of Clarke v. Braden, 10 How. text page 640.

See his 5th instruction to the jury in the trial of that case.

The failure of the Circuit Court of Appeals to consider and apply this statute is assigned for error in the pending appeal.

One further statement of fact equally meets and overwhelms Counsels' contentions. Upon the former appeal

there was directly presented for determination of this Court what was a league square. Appellants alleged in their bill a league square as used in the act of May 23, 1828, was 4438.68 acres, and that said act required appellants' ancestor to release all the 5500 acres granted to Marcos in excess of 4438.68 acres to obtain the benefit of said act of Congress.

Appellee in its answer averred the grant was confirmed to its full extent by said act of Congress.

It was a controlling issue before the District Court and the Court of Appeals. As this Court wholly failed to consider and determine this issue it was open to both courts and the duty of each of said courts to consider and determine this issue.

The failure of the District Court so to do was assigned for error on appeal to the Court of Appeals. The failure of the Circuit Court of Appeals to do so is here assigned for error.

It appears on the face of this Court's opinion upon the former appeal that it wrongly assumed it was dealing with a confirmed grant and that the Surveyor General of Florida was authorized by law to survey the grant for 5500 acres as a confirmed grant.

That this Court fell into error is conclusively established by consideration of the case of United States vs. Young, 8 Peters 484.

That case came to this Court from the old Superior Court of East Florida under the provisions of the act of May 23, 1828, and the Missouri Act of May 26, 1824, expressly extended to the Territory of Florida.

The jurisdiction of the old Superior Court was limited to cases exceeding a league square—the jurisdiction of this Court on appeal was similarly limited.

The claim of Young which he applied to the old Superior Court to confirm was for 5000 acres. That Court took jurisdiction of the case. The United States answered his peti-

tion and contested the cause on its merits. The trial court confirmed the claim and the United States attorney took an appeal to this Court, which heard the case on its merits and itself confirmed the claim.

A league square is therefore less than 5000 acres.

It therefore appears on the face of the record that without reference to any question as to the character of the grant to Marcos under the laws in force before the cession of the Floridas—which this Court in its opinion says "is the first proposition on the merits" (text 644), or of the Treaty of 1818, both of which were before this Court and unnoticed in its opinion, and were also unnoticed by the trial court and the Circuit Court of Appeals, though in brief and argument pressed upon their attention, at least three federal statutes were before the last two courts for consideration and application—that the determination of either one of these federal statutes as determined by the appellate courts would have destroyed the whole theory on which the several opinions in this case rest; and that the Circuit Court of Appeals in its opinion omitted to consider and apply either of said federal statutes and that this failure has been assigned as error on appeal to this Court.

We respectfully submit the motion to dismiss this appeal for want of jurisdiction should be denied.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors and Counsel for Appellants.

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BRIEF FOR APPELLANTS ON MOTION OF APPELLEE TO DISMISS FOR WANT OF JURISDICTION

This is a cause celèbre, and has been pending more than twice the term of the trial of Warren Hastings, of which he himself said the arraignment had taken place before one generation and judgment was pronuonced by another.

It was instituted in the District Court in A. D. 1907, and docketed in this Court at the October Term 1912, on appeal by the defendant (the present appellee) from a decree of the Circuit Court of Appeals (5th Circuit)

affirming a decree of the District Court in favor of the present Appellants.

At the October Term, 1914, the present Appellants moved this Court to dismiss that appeal for want of jurisdiction.

Appellee now holding a decree of the District Court claiming the same was made in conformity with the mandate of this Court and affirmed by the Circuit Court of Appeals, has filed in this Court a motion to dismiss the present appeal for want of jurisdiction in this Court to review such decree.

Eleven years ago Appellee maintained that the jurisdiction of this Court to review the decree of the Circuit Court of Appeals was clear, both by the statute and upon authority

It now contests the jurisdiction of this Court on the ground that the opinion of the Court of Appeals presents no Federal question.

Under Section 241 Judicial Code an appeal of right exists in any case in which the decree of the Circuit Court of Appeals is not made final. Section 128 of the Judicial Code provides that the decree of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States. At the October Term A. D. 1914 Appellants sought a dismissal of the Appeal taken by Appellee maintaining that it appeared on the face of their bill that the jurisdiction of the District Court depended entirely upon their being aliens, and filed a brief in support of their contention. This Court swept aside all the arguments presented to sustain this contention, in one brief paragraph.

This Court said: "There is scarcely a contention of complainants which does not primarily or ultimately depend upon the laws of the United States."
236 U. S. Text—p. 644.

This Court having held this case one in which the decree of the Circuit Court of Appeals is not made final, an appeal being therefore a matter of right, it would appear that the motion to dismiss should be itself dismissed as frivolous.

To save the Court the time and labor necessary to look into the record on the former appeal, a brief review of the allegations of the bill of complaint will be presented.

STATEMENT OF ALLEGATIONS OF THE BILL

Record, Pages 7 to 14 inclusive.

The First allegation of the bill states the appellants' title as being derived from a grant by Spain to one Miguel Marcos and the confirmation by the United States of that grant to his widow and children. This paragraph alleges that the grant was an inchoate right under the laws of Spain and that under the Eighth Article of the Treaty between the United States and Spain the United States occupied the position of Spain with regard to the grant and that the title thereto passed to the United States subject to the equitable claim of the grantees (pages 2 and 3 of the Record).

The Thirteenth paragraph of the bill states the action of the Board of Land Commissioners who recommended a confirmation of this grant and the report of the Board to Congress to that effect. This paragraph of the bill also states that under the provisions of the

Act of Congress of May 23, 1828 (4th Statutes at Large, page 284), the grant was confirmed to the extent of a league square to be located within the limits of the original grant (page 7, R.).

The Fourteenth paragraph of the bill alleges that by the terms of the Sixth Section of said Act of Congress, the grantees were required to accept the confirmation of the grant to the extent of a league square or bring proceedings before the Judge of the Superior Court of the District of Florida, and that no such proceedings were brought, and that the ancestors of the appellants were, by said Act of Congress, confirmed in their title to said lands, to the extent of a quantity equal to one league square (page 7, R.).

The Fifteenth paragraph of the bill alleges that the Judicial and Executive Branches of the Government of the United States held that the quantity of land contained in a league square is 4,438.68 acres; that it was the duty of the Surveyor-General of the Territory to survey the lands so confirmed. This Fifteenth paragraph of the bill then sets out, as one of the Acts of Congress relied upon by the appellants; the Act of March 3, A. D. 1807, by the terms of which it was made unlawful to take possession of, survey or cause to be surveyed, or settle upon, any lands ceded or secured to the United States by any treaty with a foreign nation, or any land, the claim to which had not been recognized or confirmed by the United States (pages 7 and 8, R.).

The Sixteenth paragraph alleges that these lands were surveyed in 1847 as public lands and from 1831 to the 12th of February, 1894, were regarded as public lands. This paragraph states the order of the Land Department of the 12th of February, 1894, declaring this grant to be a valid, confirmed, private grant to Teresa Rod-

riguez and ordered to be patented, and that on the 26th of June, 1895, the grant was patented by the United States to said Teresa Rodriguez, her heirs, assigns and legal representatives (pages 8 and 9, R.).

The Seventeenth paragraph alleges that from and after May 23, 1828, the date of the Act of Congress above referred to, and until this order of February 12, 1894, Teresa Rodriguez and her heirs, assigns and legal representatives were excluded from the possession of the land by the United States, and the United States had both the legal title and possession and right of possession of said lands, and any occupancy of said lands by any others than the United States was a mere trespass and that the appellants and those under whom they claimed were not able to take possession of the lands or to locate the same, because the United States claimed the nature of the grant was such as to make them public lands (page 9, R.).

The Eighteenth paragraph of the bill sets out the first of the tax sales sought to be decreed illegal and void, and alleges that during this period when the United States was in possession, and had the legal title to these lands, to-wit, on the 5th day of July, 1852, that the sheriff and tax collector of Orange County, Florida, attempted to sell and convey these lands for non-payment of taxes, and that the deed was placed on the public records; and that the assessment, sale and deed were null and void because the sale was for the non-payment of taxes for the years 1845 to 1850, inclusive, during which time the legal title to said lands was held by the United States, and that the United States claimed the ownership and had the possession thereof, and that the said 4,438.68 acres of said grant was so confirmed to Teresa Rodriguez as an unsegregated part thereof, and that all of said lands were, for the reasons just stated, not subject

to taxation (pages 9 and 10, R.). Subdivision 2 of this paragraph further alleges that the said 4,438.68 acres out of such grant was the only portion that could be subject to taxation under the law as construed and announced and held by the Judicial and Executive Branches of the Government of the United States (page 10, R.).

The Nineteenth paragraph of the bill alleges that on the 23rd of April, 1872, the lands contained in this grant were again sold for the non-payment of taxes for the years 1867, 1868 and 1869, and alleges that the ancestors of the appellants were, at that time, the owners of an inchoate right in 4,438.68 acres of said land under said grant by Spain, and that the United States claimed ownership of the whole grant and was in possession thereof and held and treated the lands as public lands of the United States. This paragraph further states that a deed was made under said sale on the 23rd of April, 1872, by one Robert C. Partin as Tax Collector to one William Mills. Subdivision 1 of this paragraph states that the lands were not subject to taxation during said years of 1867, 1868 and 1869, but were at all times between May 23, 1828, and up to 1895, in the adverse possession of the United States claiming to be the owner thereof. This date, May 23, 1828, was the date of the Act of Congress regarding the grant hereinabove referred to; and 1895 is the year in which the patent was made by the United States to Teresa Rodriguez, her heirs, assigns and legal representatives (page 12, R.).

The Twenty-fourth paragraph of the bill alleges that during the time that one Powell occupied portions of this land, the appellants and their predecessors in title were precluded from bringing any action for the recovery of the lands in the occupancy of Powell, for the reason that all the lands contained in the said grant were adversely held and claimed by the United States and

held to be public lands by the United States (page 15, R.).

The Thirty-second paragraph of the bill states the action of the Land Department of the United States; that the United States refused to recognize the grant until November, 1894, when the ruling of the Commissioner of the General Land Office was reversed by the Secretary of the Interior and the United States then recognized the lands as private lands and as belonging to the appellants and to those under whom they claimed. This paragraph further avers that the survey of said private claim or grant was not approved and did not become effective as a segregation of said lands from public domain until June 18th, 1894 (page 18, R.).

The Thirty-third paragraph of the bill states the action of the United States in attempting to convey a portion of these lands included in this grant to the State of Florida (pages 18, 19, R.).

The Thirty-fourth paragraph of the bill alleges that on the 26th of June, 1895, the United States patented to the legal representatives of Teresa Rodriguez the said lands granted to the said Marcos, as set out in paragraph First of the bill (page 19, R.).

The Thirty-fifth paragraph of the bill states that from and after June 26, 1895, the appellants and their predecessors were for the first time entitled to the possession of these lands and from and after said date, said lands first became subject to taxation (pages 19, 20, R.).

In the Thirty-sixth paragraph of the bill, the appellants allege that the patent is the evidence of the action of the United States upon the title to the lands granted to said Marcos, and is a conveyance of the interest of

the United States therein, and that the patent is based on the survey approved June 18, 1894. In this paragraph, the appellants then distinctly allege that the United States did not relinquish title and possession until the date of said patent, to-wit, the 26th day of June, 1895, and that until said date the appellants and those under whom they held title had no right to possession of the lands in said patent described. This paragraph further asserts that the obligation to confirm grants of lands assumed by the United States by the Treaty with Spain was political in character and was to be discharged as the United States determined, and that that Government retained possession and title from May 23, 1828, until the issuance of the patent, and that before the approval of the survey of the lands granted to Marcos, the legal title was in the United States, and the claim of the appellants attached to no particular land (page 21, R.).

Counsel for Appellee in their brief on the former appeal—Case 135, October Term, 1914, say:

"From the foregoing references to the bill of complaint, it will clearly be seen that the case made by the *appellants* was that the grant from Spain to Marcos was an inchoate grant and was not confirmed in full and complete title by the Treaty between the United States and Spain, and that the action of the Board of Land Commissioners appointed by the United States did not recognize this grant as a complete grant, and that this grant was not confirmed as a complete and perfect title by the Act of Congress of May 23, 1828. The True construction of the Treaty and its effect upon this grant are directly made necessary by the *appellants'* bill of complaint. The true construction and application of the Act of Congress of May 23, 1828, confirming the grant and its effect are made necessary by the *appellants'* case as stated in *appellant's* bill of complaint. The legal effect of the

action of the United States Land Department in refusing prior to 1894 to recognize this grant and in attempting to convey portions of it to the State of Florida under the Swamp and Overflow Land acts is made a part of *appellants'* case. The alleged necessity of a survey of the grant and of the approval of such survey, is raised by the bill, the question, as to whether a patent is necessary to perfect the title of the *appellants*, is made a part of the case under which the *appellants* claim relief in their bill. The construction, application and effect of the Act of Congress of March 3rd, 1807, in preventing persons from taking possession of or surveying lands ceded to the United States, are directly raised by the bill to excuse the *appellants* and those under whom they claim from surveying or having surveyed this grant and from taking possession or bringing proper action against others who took possession of the grant.

"The purposes of the allegations of the bill hereinbefore referred to are to present the case stated by the *appellants*, to-wit, that the sales for non-payment of taxes for the years 1845 to 1851, inclusive, were void, because, the lands were still a part of the domain of the United States and the United States was in possession of same under its laws, and that the sales for the non-payment of taxes of 1867 to 1869, inclusive, were void for the same reasons.

"The bill further alleges that, by reason of the effect of the Acts of Congress referred to in the bill and the true effect and construction of the grant and of the Treaty, the *appellants* had no right to possession of the land until 1895 and no right to maintain any action based on their claim of title to the land. These matters as to possession are set up in the bill as a part of the basis of *appellants'* right of action. It will thus be seen that appellants' case and right to relief depend upon the true

construction of the Treaty, the Acts of Congress passed to carry out the Treaty, particularly that of February 8th, 1827, and May 23, 1828, the Acts of the Board of Land Commissioners and the Decisions and Rulings of the United States Land Department and the Secretary of the Interior and the nature of the claims of the *appellants* and those under whom they derived title, to-wit, claims prior to the issuing of the said patent. Other grounds of attack are made in the Bill upon the tax sales of these lands and the deeds under which *appellee* claimed title, but the taxable character of the land was the principal ground, as shown by the Bill."

Counsel for Appellee in their brief on the former appeal have forcibly presented reason and authorities to establish the jurisdiction of this Court and refute their present contention.

We quote again, with slight change in wording, from their brief then filed:

"CONSTRUCTION OF TREATY BETWEEN UNITED STATES AND SPAIN.

"The *Appellants* in their bill of complaint insist that this grant was not subject to taxation by the State of Florida in the years 1845 to 1851, inclusive, and in the years 1867 to 1869, inclusive, on the ground that the grant of this land from Spain to Marcos was an inchoate or incomplete grant, and that by the true construction of the terms of the treaty the grant did not become a complete and perfect title in Marcos. The defendant insisted in its answer that the grant was confirmed as a complete and perfect title by the force and effect of this treaty. Therefore, the construction and application of the treaty to the grant and the language of the grant must be considered and determined by the Court before it could be

held that the lands were not subject to taxation during the years referred to, and that the sales for taxes during those years were void and that the deeds should be cancelled as claimed by appellants in their bill of complaint.

"CONSTRUCTION AND EFFECT OF ACT OF MAY 23, 1828.

(Stats. at L. p. 284).

"This grant having been made for 5,500 acres was confirmed by the force and effect of the Act of Congress of May 23, 1828, above referred to. The construction and application of this Act to the terms of the grant is absolutely necessary to support and maintain the case made in the bill by the *Appellants*. They maintain in their bill that the grant was an inchoate or incomplete grant and that under the terms of this Act of Congress a survey of the grant was necessary and a patent was necessary to pass the title of the United States and that the title to the property remained in the United States until the patent was issued in 1895. All of these contentions as to the force and effect of this Act of Congress are denied by the defendant and directly put in issue by the bill and answer passed upon by the District Judge in his decree and opinion. It is apparent from the allegations of the bill and from the judgment of the District Judge, which was affirmed by the U. S. Court of Appeals, that the construction of these acts of Congress was necessary to support and maintain the case made by the complainants in their bill. The U. S. Court of Appeals in its opinion (see pp. 1039-40 of R.) also held and determined that the title to these lands remained in the United States until the issuance of the patent and therefore were not taxable by the State of Florida.

"The bill alleges that from the year 1831 to the 12th of February, 1894, the U. S. Land Department held and

determined that this was not a valid grant and refused to recognize it, and that therefore the possession of and the title to the lands remained in the United States, and that these facts excuse the appellants or those under whom they claim from taking any action in reference to the title of possession of the land. The District Judge in his opinion sustained this construction of the force and effect of the action of the U. S. Land Department and the rulings of the U. S. Land Commission (see pp. 92-93 of R.). The defendants deny that the ruling or action of the Land Department prior to the final decision and ruling by the Secretary of the Interior had any such legal effect upon the possession or title to this land and insist that from the passage of the Act by Congress, May 23, 1828, the legal title and right of possession in these lands was in Teresa Rodriguez and her heirs and assigns. The force and effect of the action of the U. S. Land Department and the true construction of the act of May 23, 1828, as to its application to this grant is thus drawn directly in question in this suit. The bill alleged that prior to the ruling of the Secretary of the Interior, February 12, 1894, both the Executive and Judicial Departments of the Government had determined that a league square of land, as mentioned in the act of Congress of May 23, 1828, was 4,438.60 acres, and as this grant contained 5,500 acres, the entire grant was not confirmed by the force and validity of the act of May 23, 1828. The Secretary of the Interior in his opinion and by his order of February 12, 1894, held that a league square was within the meaning of the said act of Congress and contained 6,002.50 acres, and therefore that by the force and effect of the said act of Congress of May 23, 1828, this grant was fully confirmed and vested title in Teresa Rodriguez, her representatives, heirs and assigns. The ruling therefore of the Secretary of the Interior and the action of the Land Department were directly involved in this case, as affecting the taxable

character of the land from the date of said act of Congress and the right to the possession of the land by the appellants and those under whom they claim.

"The bill of complaint alleges that a survey of the grant was necessary and further alleges that this survey was not approved until June 18, 1894. The complainants in their bill refer to the said patent as a part of their case and as a part of the bill. The patent is found on pages 838 et. seq. of the record. The appellee alleged in the answer that the grant did not require any survey under the terms of the grant and laws of the United States; that under the proper construction of the laws of the United States the survey was approved by force and effect of the order of approval of B. A. Putnam, Surveyor-General, in 1851. The appellants insist that a survey and approval of the survey was necessary and that the only approval which could be recognized by the Courts of the United States was one made in 1894 and that prior to this approval of the survey in 1894 the land was not subject to taxation. These were Federal questions which depended upon the construction of the laws of the United States for their determination."

"The bill proceeds upon the theory of the necessity of the issue of a patent to make perfect and complete title of *appellants* or those under whom they claim before the land could be assessed for taxation or sold for nonpayment of taxes. This question necessarily requires a consideration of the grant from Spain to Marcos and its terms and effect, of the treaty in regard to such grant, the action of the Land Commissioners, and the acts of Congress passed to carry out this treaty. The appellee insisted that no patent from the United States was necessary to perfect this title; that must be determined under the treaty, the terms of the grant and the terms of the acts of Congress, and directly present Federal questions

requiring a construction of the treaty and the several acts of Congress applicable to this grant. The determination as to the taxable character of the land, the possession and right of possession of this land prior to the issue of the patent, the effect of the laws of the United States upon the taxable character of the land and the nature of the title of the United States in the land prior to the patent, are all involved in the case, and appellants' right to have these sales for taxes declared void and the deeds made in pursuance of the sale cancelled depend upon the construction that this Court will put upon the Grant, the Treaty and the Acts of Congress, namely, as to whether or not a patent was necessary to issue from the United States to vest such title in the *appellants* as was subject to taxation."

"In the bill of complaint (p. 8 of R.) it is asserted by appellants that by the force and effect of the act of Congress of March 3, 1807, *appellants* and those under whom they claim were excluded from the possession of this land, and the United States had possession and the right of possession, and therefore the land was not taxable, and that *appellee* and those under whom it claims could acquire no title by adverse possession. It will be therefore necessary for this Court in determining the complainant's case made by its bill to construe this act of Congress. The District Judge in his opinion (p. 92 of R.) found and determined that prior to the issue of the patent the grantee, Teresa Rodriguez, and her representatives, could not have legally reduced this land to possession and in and by said ruling adopted the construction put by the complainants upon this act of March 3, 1807. This therefore is another Federal question directly raised by the bill and involved in this suit."

"All of the Federal questions that we have above stated were raised by the *appellants* in the bill of com-

plaint and directly passed upon and adopted by the District Judge in his opinion and were affirmed by the Court of Appeals in its judgment and decree on the appeal first taken to that Court."

"*APPELLANTS*' BILL OF COMPLAINT STATES RIGHTS UNDER THE TREATY BETWEEN SPAIN AND THE UNITED STATES AND ALSO UNDER THE LAWS OF THE UNITED STATES, PARTICULARLY AS TO THE ALLEGED NON-TAXABLE CHARACTER OF THE LANDS IN QUESTION."

"APPEAL LIES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS TO UNITED STATES SUPREME COURT WHERE SUCH FEDERAL QUESTIONS ARE INVOLVED."

"See Cousin vs. Labatut, 19 How 202, 15 L. Ed. 601. In this case it was decided that where the Laws of Congress, and the acts of officers executing them in perfecting titles to public lands, are drawn in question and construed that there existed a Federal question authorizing this Honorable Court to examine the judgment of the final appellate State Court. The same construction of the Act of Congress would apply giving a right of appeal from the judgment of the United States Circuit Court of Appeals to this Court."

"Mitchell, Governor, etc. of Florida vs. Furman, 180 U. S. 402. This case was relied upon by *appellants* in their brief in support of the motion to dismiss. It is stated in their brief that the case at bar is exactly the converse of the Furman case above mentioned. It would seem, from an examination of the opinion, that the federal jurisdiction and the jurisdiction of an appeal from the United States Circuit Court to this Court of United States was sustained. The Court held as follows:

'The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the Circuit Court and to justify an appeal from its decree directly to this court.'

"ALLEGATIONS OF APPELLANTS' BILL THAT THEY AND THOSE UNDER WHOM THEY CLAIM WERE EXCLUDED FROM POSSESSION BY THE UNITED STATES AND THAT APPELLEE AND THOSE UNDER WHOM IT CLAIMS COULD NOT ACQUIRE TITLE BY ADVERSE POSSESSION UNTIL PATENT ISSUED PRESENTS A FEDERAL QUESTION."

"In the bill of complaint in this case in paragraphs Fifteenth, Seventeenth, Twenty-fourth and Thirty-sixth, the appellants assert that no right or title by adverse possession of these lands could be claimed by appellee and those under whom it claims, because no right or title of possession existed in the *appellants* or those under whom they claim prior to the issue of the patent and that, during that period, the United States had the title and right of possession and claimed the exclusive ownership of this land. The district Judge and the U. S. Court of Appeals adopted this view of the case (see page 92 of record) and overruled and denied all of the claims of title of the appellee under the Statutes of Limitation and under adverse possession. These claims of the *appellants* in their bill and this ruling of the Court and its opinion are based upon a construction of the right and title of the United States and the right and title of *appellants* under the laws of United States during the period from the ceding of the State of Florida by Spain to the United States to the date of the patent, June 26, 1895. This decision is based upon the contention of *appellants* that the grant was an inchoate title and was not confirmed as a full and perfect title by Act of 1828

and that a further survey and confirmation of the survey and a patent was necessary to vest title and right of possession in the *appellants* and those under whom they claim. These are rights claimed under the treaty and under the laws of the United States and present for decision in this case Federal Questions which are also subject to review in this Honorable Court.

"On account of the existence of all of the Federal questions above referred to and appearing in the *appellants*' bill of complaint and decided by the District Judge and affirmed by the United States Court of Appeals, we insist that an appeal lies in this case from the judgment and decree of the United States Circuit Court of Appeals to this Honorable Court. The construction contended for by *appellants* of the Grant and the various acts of Congress referred to in the bill, the treaty between the United States and Spain, the action of the United States Land Department and the decision of the Secretary of the Interior and the effect and construction of a patent from the United States are necessary to the case attempted to be made by the appellants. The *Appellants*' right to have these deeds cancelled under which *appellee* claims title and the *appellants*' right as against the adverse possession of *appellee* and the effect of the Statutes of Limitation were all dependent on these claims made by *appellants* under the laws of the United States. We, therefore, submit that this motion to dismiss the appeal should be denied."

The prayer which the present appellee submitted to this Court at its October Term 1914 we now respectfully submit on behalf of appellants.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors for Appellants

FILED
OCT 5 1925
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS et al.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

Motion that the Court hear the cause upon a record consisting of the thirty copies of all proceedings since the mandate in the former appeal, and six copies of the record in said former appeal (Case No. 1030, October Term 1912).

Appellants in the above entitled cause by their solicitors of record move the Court to hear the appeal now pending in said cause upon a record consisting of thirty copies of all proceedings had in said cause since the mandate of this Court entered upon the former appeal herein, Case No. 1030 October Term 1912 (reported in 236 U. S. 635) and six copies of the printed record filed by

appellants in said former appeal, together with such additional copies of such original record as Counsel for Appellee may furnish, on direction or otherwise.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,

Solicitors and of Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS et al.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

AFFIDAVIT OF COUNSEL FOR APPELLANTS IN RE. COPIES OF ORIGINAL RECORD.

State of Florida }
Orange County }

Joseph H. Jones of Counsel for Appellants being first duly sworn, deposes and says:

That since the order made in this cause (No. 678 October Term 1924) he has diligently sought to procure copies of the original record in said cause (Wilson Cypress Company vs. Enrique Del Pozo y Marcos et al.) twenty copies of which were filed in the Supreme Court

of the United States at the October Term, A. D. 1912 (Case No. 1030); that after persistent effort he and his associate counsel have not been able to procure more than five copies,—four of which have been filed in said Court; that deponent has exhausted all his resources, except asking present and former counsel for appellee to furnish copies in their or either of their possession. Deponent is advised that the twenty copies filed in the above entitled Court were destroyed by order of said Court, and to his best knowledge and belief the only copies now in existence are as follows:

Two copies in the files of the Circuit Court of Appeals, 5th Circuit; one copy held by Associate Counsel (to be filed in the Supreme Court before hearing on the merits); one bound copy; four other copies now on file in the Supreme Court of the United States, and such copies as may be in the possession of counsel and former counsel of appellee.

.....

Sworn to and subscribed before me this..... day of August, A. D. 1925.

.....

Notary Public for State of Florida.

State of Florida)
County of Orange)

John C. Jones, being first duly sworn, deposes and says he has read the foregoing affidavit of his Associate Counsel, Joseph H. Jones, Esq., and he believes the facts stated therein are true.

.....

Sworn to and subscribed before me this..... day of August, A. D. 1925.

.....

Notary Public for the State of Florida.

State of Maine)
County)

William W. Dewhurst, being first duly sworn, deposes and says he has read the foregoing affidavit of his Associate Counsel, Joseph H. Jones, Esq., and he believes the facts stated therein are true. Deponent further says that he furnished one of the four copies now filed in the Supreme Court, and has in his possession one copy only, which he intends to file in said Court before said cause is heard on its merits.

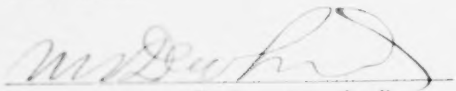
.....

Sworn to and subscribed before me this..... day of September, A. D. 1925.

.....

Notary Public.

I find there is one bound copy of the record and a bound copy of the briefs filed in the former appeal in the Library of Congress.



Of Counsel for Appellants.

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In the Supreme Court of the United States

October Term, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

STATEMENT OF THE CASE.

By the record of the former appeal it appears that on June twenty-sixth, 1895, the United States issued a patent to Teresa Rodriquez, her heirs and assigns, for Section 37, Township 19, Range 28, and Section 41, Township 19, Range 29, 5486 acres *"as appears by a plat and description thereof * * * approved June* 18, 1894, *by the signature of W. H. Milton, Jr., Surveyor General of the State of Florida."*

Prior to issuance of the patent—A. D. 1891, Appellants had sued Appellees' predecessor in claim of title on the law side of the State Court and failed to re-

cover—probably because the legal title stood in the United States. Record page 259.

After negotiating with the attorney of the patentees in 1896 and 1898, for the purchase of a part of their tract of land, Appellee on May 3, 1900, elected to buy from Florida Land and Colonization Company its tax title to the lands covered by said patent, at a price less than two dollars an acre. The Land Company gave and Appellee took a deed in legal effect a quit claim.

In A. D. 1903 Appellants brought suit against Appellee which was dismissed without prejudice. On May 1, 1907, Appellants brought this suit to cancel Appellee's deed as a cloud on title. The contents of their bill and the issue made by Appellee's answer are set out in the statement of this case reported in 236 U. S. page 635.

Upon final hearing of the voluminous record, the District Court rendered its opinion on January 20, 1912.

The learned District Judge, whose knowledge of the questions involved was extensive, and whose fidelity to his duties, the Bar reveres, found and determined:

(a) That the Court was not bound by the views of an executive upon existing laws, which lead up to the issuance of a patent.

(b) That the concession to Marcos was held by the Land Department to exceed a league square and to be unconfirmed from 1828 to date of Secretary Smith's ruling, February 1894, to-wit, that a league square was 6,002 acres, Record page 846.

(c) That the official plats of the Land Office did not show the Marcos grant. (Record page 848.)

(d) That it appears by the patent itself that the survey (on which the patent issued made a part thereof) was approved June 18, 1894. (Record page 838).

(e) That the Land Department had patented to the State a portion of the land under the act of 1850.

(f) That upon all the evidence it was established that from 1831 to February, 1894, the United States held the patented lands as its property, and in 1894 abandoned its claim of title to the heirs of the original grantee under Spain. (Record pages 835-846.)

(g) That there was no time prior to 1894 at which the grantee or her representatives could have reduced the land to possession.

(h) That taxation by the state prior to the issuance of the patent was not justified.

(i) That no claim of occupation or possession while the United States held the title could be set up, and persons holding tax deeds issued while the United States claimed the land to be public could not rely upon title by adverse possession, nor rely upon the statute of limitations before the patent issued.

(j) That Appellee, before it took its deed, had notice of the issuance of the patent to Appellants. (Record pages 833-834).

(k) That Appellants made every reasonable effort to enforce their rights; that there had been no unreasonable lack of diligence on the part of Appellants to maintain their rights.

(l) That the holders of the tax titles must be held to have assumed the risk that the United States

might convey its title to the claimants under Marcos.

(m) That Appellee had not had such occupancy of the lands as would make title by adverse possession: that "it makes no difference what the occupation or possession may have been while the title to property was in the United States, and it is not considered that the possession during such time can be resorted to to determine whether or not the property was, after the issue of the patent, in the actual possession of the defendant (Appellee) through its agent, sufficient to legally bar a right to maintain a bill to remove cloud from title."

(n) That the burden of proof was on Appellee to show its cabin was located on the lands patented to Appellants.

(o) That the bill could be maintained by some of Appellants on their own title and in behalf of the others entitled to the benefit of the suit.

The District Court's decree in favor of Appellants was entered January 13, 1912.

The decree found eight named Appellants owned an undivided estate in the lands described in the patent, and for themselves and as representatives of the other patentees were entitled to maintain this suit; found the tax deed to Stark, dated June 27, 1852, and the tax deed to Mills dated April 23rd, 1872, were based upon assessments made while the lands were claimed by the United States and were void; that Appellee had no estate in the patented lands, and enjoined it from claiming any right therein by virtue of any occupancy had thereof. (Record pages 97 to 102.)

From this decree Appellee appealed to the Circuit Court of Appeals, where the case became No. 2354 at Fall term, 1912. The printed record therein is before the Court on this appeal.

The Circuit Court of Appeals affirmed the decree of the District Court, (202 Federal 742) and Appellee entered its appeal to this Court on the 28th of February, 1913.

March 15, 1915, this Court reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court for further proceedings "in accordance with this opinion."

236 U. S. 635, text 657.

This Court denied (a) petition for re-hearing; (b) motion to recall its mandate and reinstate the cause; (c) motion for leave to file a supplemental bill in the nature of a bill of review in the District Court.

241 U. S. 652.

After the filing of the mandate, Appellants sought a reference to a master to receive certain documentary evidence, with respect to the law and facts applicable to the title to the lands patented to Teresa Rodriquez, and of recognitions made by Appellee with respect to the ownership of Appellants of the lands in suit.

The District Court held that this Court had made "the law of the case;" that the patented lands were subject to taxation "subsequent to 1828;" that other issues made by the pleadings were open for decision, and denied the application February 8, 1917. (Record in the Circuit Court of Appeals p. 1068).

Thereafter Appellants applied for leave to strike out

certain allegations of their bill. The Court after further study of the opinion found that the Supreme Court had decided that the interest of complainants' ancestor in the lands granted by Spain was taxable, that the survey made of the lands by the United States fixed their situs; and that the mandate left open for the decision of the District Court:

(a) The sufficiency of the tax deeds.

(b) The possession of Appellee and its predecessors in title.

(c) The question of laches and statute of limitations.

The application was denied on May 31, 1917. (Record pages 1105-1107.)

June 23, 1917, the cause was argued by counsel upon the printed record in this court; pages 1 to 1038 of the record now before this court.

The learned Judge was evidently embarrassed.

Being a District Judge, though he knew it to be the fact, he could not declare this Court had disregarded the law of the case established by an unbroken line of its own decisions—had assumed the survey of the lands as a private claim was made under the Act of June 23, 1848, providing for the survey of the Florida Keys, whereas the records of the Land Department were replete with evidence that the surveys of private claims in Florida were made under Sec. 7 of the Act of February 8, 1827; and knew this Court had declared the field notes and "the official plat thereof were approved by the Surveyor General, June 20, 1851," when Judge Locke's opinion recited the letter of the Surveyor General to the Commissioner of the General Land Office

dated June 18, 1894, found in the record page 847, which states "that the official plats of Township 19, South Range 28 East, and of Township 19, South Range 29 East, do not show the claim of Teresa Rodriquez" that the plat of the survey approved by Putnam was "loosely appended to the said township plat."

He knew that as a matter of law, Putnam had no power to set aside the survey of the lands as public lands approved by his predecessor, Butler, May 15, 1848, and that this Court had failed to notice the act of 1827 although the patent recites that the claim "was confirmed by the act of Congress of the 8th of February, 1827." (Record page 839 to page 979.)

Although this Court decided that all the conditions of a taxable property existed "when the grant was surveyed;" that "a valuable property was confirmed to complainants which only needed a survey to identify it and when surveyed was segregated from the public domain." the learned District Judge well knew, that by an unbroken line of decisions of this Court, the law of the case had been settled to be: that confirmed Florida claims required the issuance of a patent: that such patent by statute could issue only when it had been established to the satisfaction of the Commissioner of the General Land Office that the certificate given the claimant by the Surveyor General "had been fairly obtained and corresponded with the transcripts" submitted (returned) to the office of the register of the land office of the district: that recognition of complainant's claim by confirmation extended only to the boundaries the concession itself furnished; that the claim confirmed was a mere inchoate claim to 5500 acres without definite location or boundaries; that the confirmation was limited to a league square to be located by the claimant within the bounds of the original grant by sectional lines; that the Superior

Court of Florida and this Court had held that the league square as used in the several acts of Congress for settlement of Florida land claims was less than 5,000 acres; that the failure to file an acceptance of a league square, prior to May 26, 1831, rendered the confirmation ineffective for any quantity of land whatever. In the words of Mr. Chief Justice Fuller: "by the action of Congress all of the claim except a league square was rejected; as there was no release of the excess the condition of the confirmation failed."

Mitchell v. Furman, 180 U. S. text 438.

Can it be doubted that the District Judge felt he was precluded from controverting the reasoning found in this Court's opinion, and from year to year, postponed declaring the law of this case as the unbroken rules of the previous decisions of this Court, other than the opinion in this case, had settled it, and more than five years after it was argued, turned it over to Judge Bryan to hear and decide?

The cause was again argued before Judge Bryan upon the printed record in this Court and on July 26, 1922, he filed his opinion and rendered the decree which was affirmed by the Circuit Court of Appeals, and is now before this Court on appeal.

The Court must bear in mind that the decree appealed from is wholly based upon the opinion rendered by this Court, upon the former appeal, that under the law was settled by the Florida case of Mitchell v. Furman 180 U. S. Text 438, the property interest held by complainants' ancestor was a mere shadow, the full title being in the United States after the time limited by the statute for applying to the Superior Court of East Florida for a confirmation of the full grant of 5500 acres.

Understanding that this Court had decided that the lands were taxable "when the grant was surveyed" and remanded the case for decision in accordance with its opinion, Judge Call was unwilling to make a decision contrary to his knowledge of the previous decisions of this Court and his conviction of the law of the case.

Judge Bryan on the other hand, at the oral argument declared that he was bound by the opinion rendered by this Court.

He finds the two tax deeds utterly void, being without any authority of law, yet he makes a decree in favor of the defendant on the ground that the holder under the later tax deed, by acts of dominion asserted since A. D. 1872 had established title by adverse possession: "that the actual possession shown of portions of the land under color of title established title to the whole grant." Record pp. 1120-1122. Yet it appeared by the record, p. [illegible], that the United States patented to the State of Florida approximately 1400 acres of the tract about the above named date. (Record pp. [illegible]

The concluding paragraph of the learned Judge's opinion is: "I think the claim of the plaintiffs is barred by laches. Powell began to live upon the property and to assert acts of ownership and dominion over it 35 years before this suit was brought. For more than 50 years the plaintiffs failed to pay taxes. It is too late now, after so great a lapse of time, and after the property has increased many times in value to seek the active aid of a Court of equity."

In point of fact this suit and the suit preceding were instituted long before any increase in value occurred.

Of Judge Bryan's opinion, the Court of Appeals

says: (299 Federal 261): "The opinion rendered by the trial judge shows that the decree appealed from was based on the conclusion that prior to the institution of the suit, appellee had acquired title to the land by adverse possession, etc.

It then states that appellants contend that title remained in the United States until the patent issued; that prior to that date the land was not subject to be acquired by tax title, or by possession adverse to those under whom appellants claim.

The Court says: "We are of opinion that the contentions dependent upon the just stated propositions have been disposed of by the decision of the Supreme Court. That Court decided that the land was taxable from the date of the survey in 1851; the ground of that decision being that the title relied on by appellants was vested upon the identification of the land granted by the survey, the field notes and the *official plat* whereof were approved by the Surveyor General June 20, 1851.

" * * * * The questions whether the title asserted by the bill was, prior to the date of the patent, subject to be lost by adverse possession, and whether the conduct prior to that date of the owners of that title, are no longer open in this Court."

When the Circuit Court of Appeals rendered its opinion, it had before it a copy of the opinion of the Attorney General that there was no provision of law authorizing the survey of "floating and uncertain claims—mere rights of location" such as the Marcos Claim.

See letter to the Secretary of the Treasury, dated February 5, 1841—"Location of Grants to the Sons of Benito Vasquez" Opinions of the Attorney General, Volume 2, page 1377.

It also had before it a copy of the letter of the Commissioner of the General Land Office to the Surveyor General of Florida dated February 26, 1827, reading as follows: "I have now the satisfaction to transmit a paper containing a copy of the act to provide for the confirmation and settlement of private land claims in East Florida, and for other purposes.

You will perceive that the 7th and subsequent sections of this bill *provide for the surveying and connecting with the township lines the private CONFIRMED claims*, and for designating on the township plats the unconfirmed claims over 3500 acres, which have been filed with the commissioners.

"The 7th Section of this act has invested you with extensive powers and very responsible duties both executive and *JUDICIAL* * * *.

"The 8th section provides for the return of the surveys to the *register and receiver*: this of course cannot be done until the township plats are completed. The public lands therefore in each township should be surveyed at the same time that the private claims within the same are surveyed * * * *."

See Public Land Laws 1838 Vol. 2, page 863.

There was also before the Circuit Court of Appeals a copy of another letter from the Commissioner to the Surveyor General dated June 6, 1833, reading as follows:

"The first section of this act (supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida) confirm * * * * claims in East Florida as have been recommended for confirmation by the Commissioners * * * * on the con-

Admitting to the fullest extent the bias which is attendant upon the prosecution of a cause, we respectfully contend that this Court did fall into error in its opinion on the former appeal and that this appears by statutes, opinions and instructions of the Department of Justice, of the Land Department and the earlier opinions of this Court.

Under these peculiar circumstances will this Court insist upon a strict compliance with its rules before it will look into the record of the former appeal?

To ask the question is to answer it. We feel very confident that this Court will not depart from its traditional fairness.

It will lend its aid to the full extent to examine and review its former opinion in this cause.

In this firm belief we submit for favorable consideration our motion that the Court will hear this cause on the merits upon the six copies of the record on the former appeal together with 30 printed copies of the record since its mandate herein.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors for Appellants.

Office Supreme Court, U. S.
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APR 22 1925
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1924~~ 1925

No. ~~623~~ 184

ENRIQUE DEL POZO Y MARCOS ET AL., APPELLANTS,

vs.

WILSON CYPRESS CO.

MOTION BY APPELLEE TO DISMISS THE APPEAL.

J. C. COOPER,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 678.

ENRIQUE DEL POZO Y MARCOS ET AL.

vs.

WILSON CYPRESS COMPANY, A CORPORATION.

MOTION TO DISMISS THE APPEAL.

The appellee in the above entitled cause by its solicitors and counsel of record, moves the Court to dismiss the appeal from the decree of the United States Circuit Court of Appeals from the Fifth Circuit, taken and allowed in the said above entitled cause, upon the following grounds:

1. That this Court is without jurisdiction to determine said appeal.

2, That the record, decree, rulings and decisions in said cause and the grounds thereof and reasons therefor, as stated in the decisions, present no Federal questions.

3. That the decree, decision and opinion in said cause show that the said questions involved were decided upon the Statute of Limitations under the laws of the State of Florida and the laches of appellants, and not upon any Federal question.

J. C. COOPER,
Solicitor and of Counsel for Appellee.

[Endorsed:] The Supreme Court of the United States, October Term, 1924. Case No. 678. Enrique Del Pozo y Marcos et al., appellants, v. Wilson Cypress Company, a Corporation, appellee. Motion to Dismiss the Appeal. Law offices, Cooper, Cooper & Osborne, Atlantic National Bank Building, Jacksonville, Florida.

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1925

NO. 184

ENRIQUE DEL POZO Y MARCOS, ET AL.,
Appellants,

vs.

WILSON CYPRESS COMPANY,
Appellee.

MOTION TO DISMISS THE APPEAL FOR FAILURE TO FILE OR PRINT THE RECORD, AND BRIEF IN SUPPORT OF MOTION.

J. C. COOPER, H. C. CLARK,
Counsel for Appellee.

THE DREW PRESS, JACKSONVILLE 451775

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS, ET AL.,
Appellants,

vs.

WILSON CYPRESS COMPANY,
Appellee.

MOTION TO DISMISS THE APPEAL FOR FAILURE TO FILE OR PRINT THE RECORD.

The appellee in the above entitled cause, by its solicitors and counsel of record, as a Motion to Dismiss the Appeal in said cause, moves the Court to dismiss the appeal and the decree of the United States Circuit Court of Appeals of the 5th Circuit taken and allowed in the said above entitled cause, upon the following grounds:

1. That the appellants have failed to have taken the necessary steps for printing the record or such portions thereof as appellants were required to print under the order of the Court herein of October 13th, 1924, and as required by the rules of this Court.

2. That the Clerk of this Court has not accepted the number of printed copies of the record which have been filed by the appellants and no steps have been taken to print the record.

3. That the number of printed copies filed by appellants are not sufficient so that there may be one copy for each member of the Court or so as to furnish to appellee's counsel copies of the record.

4. That the said record in said cause has not been printed or completed as required by the rules of the Court in such cases.

5. That there are not now on file in this Court the number of printed records on the appeal in this cause required under the order of the Court herein of October 13th, 1924, and as required by the rules of this Court.

J. C. Cooper, N. C. Clark

Solicitors and Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS, ET AL.,
Appellants,

vs.

WILSON CYPRESS COMPANY,
Appellee.

To the Solicitors and Counsel for Appellants:

Please take notice that appellee in the above entitled cause on the first Monday, 5th day of October, A. D. 1925, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court room in the city of Washington, in the District of Columbia, as a Motion to Dismiss the Appeal in said cause, will move this Honorable Court upon the record herein to dismiss the appeal taken from 5th Circuit upon the grounds stated in said motion, copy of which and memorandum brief are herewith served upon you and that the said record on said appeal has not been printed, or proceedings taken by the appellants to have same printed, or to furnish the number of copies of such

record as required by the rules of this Honorable Court, or on the order of the Court heretofore made in this cause.

J. C. COOPER, and
H. C. CLARK, *Solicitors and Counsel for Appellee.*

To Messrs. Wm. W. Dewhurst, St. Augustine, Fla.
Jos. H. Jones, Orlando, Florida.
John C. Jones, Orlando, Fla.
Solicitors and Counsel for Appellants.

I hereby accept service of the foregoing Motion and Notice for submitting same on Monday the 5th of October, A. D. 1925.

September_____, 1925.

_____

Solicitors and Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS, ET AL.,
Appellants,

vs.

WILSON CYPRESS COMPANY,
Appellee.

BRIEF SUPPORTING MOTION OF APPELLEE TO DISMISS FOR FAILURE TO PRINT TRANSCRIPT.

Official reports of previous opinions in this case are:

Wilson Cypress Co. vs. Pozo y Marcos (decided February 4, 1913), 202 Fed. 742; 121 C. C. A. 578.

Wilson Cypress Co. vs. Del Pozo y Marcos (decided March 15, 1915), 236 U. S. 635; 59 L. Ed. 758.

Del Pozo et al vs. Wilson Cypress Co. (decided May 31, 1924), 299 Fed. 261.

On October 6, 1924, one year ago, appellants presented motion praying that the present appeal be heard on the printed transcripts which were before this Court in a former appeal, supplemented

by printed transcripts since used before the United States Circuit Court of Appeals. The prayer of this motion specifically stipulated that "the other portions of the Transcript to be duly printed as required by the rule and as this Honorable Court shall direct." The motion also stated:

> "Appellants show that at time of the former appeal there were duly filed in this Court 30 copies of the Transcript of the Record consisting of 1038 printed pages and several blue print maps."

The journal of this Court for October 13, 1924, shows: "Motion to accept a limited number of printed copies of the record granted."

Since October 13, 1924, appellants have taken no steps to print any part of the transcript. Furthermore, it develops that the "30 copies" of the transcript printed in May, 1913, on the former appeal had long since been destroyed by the clerk in the usual course of discarding old records to make room for new cases, and that appellants have been able to supply only 5 or 6 copies of this transcript.

Appellants have made no attempt to meet the rules of this Court governing the printing of transcripts. Appellants have not furnished the clerk with nor served upon appellee a designation of any part of the record to be printed. Appellants have made no deposit with the clerk to apply on the printing of any part of the transcript.

The least number of printed copies of a record contemplated by the rules of this Court under any

circumstances is 10 printed copies (*Rule 35, paragraph 7*). This number is permitted only in submitting petition for certiorari, and if the petition is granted, the full 30 copies of the record "must be promptly supplied, by further printing if necessary."

Paragraph 4 of *Rule 38* requires the full 30 copies of the record to accompany a petition for certiorari to the Court of Claims.

Appellee is unable to proceed with this case, except to move dismissal or affirmance. This is a second appeal, and the rules of this Court recognize that appellee is entitled to prompt disposition. *Paragraph 5* of *Rule 18* provides:

> "Cases once adjudicated by this Court upon the merits, and again brought up, may be advanced by leave of the Court."

The rules of this Court do not countenance delay and inattention by appellants. If an appellant fails to docket a case after having an appeal allowed, appellee may have the case docketed and dismissed. (*Rule 10, Paragraph 1*). If an appellant does not pay to the clerk the estimated sum for printing the record within 70 days after the case is docketed, "it shall be the duty of the clerk to report that fact to the Court, whereupon the cause will be dismissed, unless good cause to the contrary is shown." (*Rule 11, Paragraph 2*). If an appellant fails to print a material part of the record, the appeal may be dismissed. (*Rule 11, Paragraph 9*).

A default by an appellant in preparing or filing brief is ground for dismissing the case. (*Rule 25, Paragraph 5*).

In *Steever vs. Rickman,* 109 U. S. 74, 75; 27 L. Ed. 861, Mr. Chief Justice Waite, speaking for the unanimous Court, stated:

> "If, through the fault of a plaintiff in error or appellant, printed copies of the record are not furnished to the justices or the parties when required in the due prosecution of the cause, the writ or appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary."

In *Portland Company vs. United States,* 15 Wall. 1; 21 L. Ed. 113, the unanimous opinion of the Court was announced by Mr. Chief Justice Chase, that appeal should be dismissed because of the disregard of the rules of Court by appellants' counsel in making up his brief. To the same point see *Benites vs. Hampton,* 123 U. S. 519; 31 L. Ed. 260.

Want of due prosecution of an appeal in accordance with the rules of this Court is ground for dismissal.

Winslow vs. Wilcox, 105 U. S. 447, 451; 26 L. Ed. 1065, 1066.

United States vs. Burchard, 125 U. S. 176, 178; 31 L. Ed. 662.

Rules of Court have the force of law.

Rio Grande Irrigation Company vs. Gildersleeve, 174 U. S. 603, 608; 43 L. Ed. 1103, 1105.

On October 7, 1924, this Court entered an order dismissing the case of *Louisville and Nashville Railroad Company vs. United States,* because of the failure of appellant to comply with the rule governing printing of the transcript

In *Weston vs. City of Tulsa,* on March 23, 1925, this Court declined to give consideration to a motion presented by an appellant who was in default under the rules of this Court.

It is noteworthy that the transcript filed by appellants does not present the evidence in simple and condensed form, as required by *Equity Rule 75.* The evidence in the record which was before this Court in 1913 was prepared when the first appeal was taken to the United States Circuit Court of Appeals in 1912. The clerk of the United States District Court for the Southern District of Florida certified to the record in April, 1912 *Equity Rule 75* was not then in force. Appellants' failure to comply with this rule, even though the printing of the transcript had been duly attended to, would in itself warrant dismissal of the appeal.

Newton vs. Consolidated Gas Company, 258 U. S. 165; 66 L. Ed. 538.

Houston vs. S. W. Bell Telephone Co., 259 U. S. 318; 66 L. Ed. 961.

Respectfully submitted,

J. C. COOPER,
HENRY C. CLARK,
Solicitors and Counsel for Appellee.

(11)

Deny

FILED
SEP 17 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

APPELLANTS,

vs.

WILSON CYPRESS CO.

APPELLEE.

MOTION BY APPELLEE TO DISMISS THE APPEAL OR TO AFFIRM THE SAID DECREE AND BRIEF IN SUPPORT OF MOTION.

J. C. COOPER, H. C. CLARK,
Counsel for Appellee.

THE DREW PRESS, JACKSONVILLE 451776

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

vs.

WILSON CYPRESS COMPANY, A CORPORATION.

MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE SAID DECREE

The appellee in the above entitled cause by its solicitors and counsel of record, moves the Court to dismiss the appeal from the decree of the United States Circuit Court of Appeals for the Fifth Circuit, taken and allowed in the said above entitled cause, or to affirm the said decree, upon the following grounds:

1. That this Court is without jurisdiction to determine said appeal.

2. That the record, decrees, rulings, opinions and decisions in said cause and the grounds thereof and reasons therefor, as stated in the opinions and decisions, present no Federal questions.

3. That the record, decrees, decisions and opinions in said cause show that the said questions

involved were decided upon the Statute of Limitations under the laws of the State of Florida and the laches of appellants, and not upon any Federal question.

4. That the questions sought to be raised by appellants on which the decision of the cause will depend are so unsubstantial as not to need further argument.

J. C. COOPER,
H. C. CLARK,
Solicitors and of Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925.

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,

APPELLANTS,

vs.

WILSON CYPRESS COMPANY,

APPELLEE.

To the Solicitors and Counsel for Appellants:

Please take notice that Appellee in the above entitled cause on the 5th day of October, A. D. 1925, at 12 o'clock noon, or as soon thereafter as Counsel can be heard, at the Supreme Court Room in the City of Washington, in the District of Columbia, will move this Honorable Court upon the records herein to dismiss the appeal taken and allowed in the above stated cause from the decree of the United States Circuit Court of Appeals for the Fifth Circuit, or to affirm the said decree, upon the grounds stated in said Motion, copy of which is herewith served upon you.

J. C. COOPER and H. C. CLARK,
Solicitors and Counsel for Appellee.

To Messrs. Wm. W. Dewhurst, St. Augustine, Fla.
Jos. H. Jones, Orlando, Florida.
John C. Jones, Orlando, Florida.
Solicitors and Counsel for Appellants.

I hereby accept service of the foregoing Motion and Notice for submitting same on Monday, the 5th of October, A. D. 1925.

September ....., 1925.

.....

Solicitors and Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925.

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.

vs.

WILSON CYPRESS COMPANY.

Appeal from United States Circuit Court of Appeals for 5th Circuit.

BRIEF OF APPELLEE ON MOTION TO DISMISS FOR WANT OF JURISDICTION OR TO AFFIRM THE DECREE.

STATEMENT OF THE CASE.

Official reports of previous opinions in this case are:

Wilson Cypress Co. vs. *Pozo y Marcos* (decided February 4, 1913), 202 Fed. 742; 121 C. C. A. 578.

Wilson Cypress Co. vs. *Del Pozo y Marcos* (decided March 15, 1915), 236 U. S. 635; 59 L. Ed. 758.

Del Pozo et al vs. *Wilson Cypress Co.* (decided May 31, 1924), 299 Fed. 261.

This cause is now before the Court on Motion of Appellee to dismiss the appeal for want of jurisdiction or to affirm the decree. The grounds are stated in the motion, namely, that the cause now presents no Federal questions and that the cause was decided in both the District Court and United States Circuit Court of Appeals upon the Statutes of Limitations under the laws of Florida and upon the laches of the appellants. Further that the questions on the appeal are so unsubstantial as not to need

further argument. This is a Bill in Equity filed on May 1st, 1907, by the appellant against the appellee for the cancellation of certain deeds under which appellee claimed title, and to enjoin the appellee from taking possession of the lands described, or claiming the lands, or interfering with appellant's alleged possession. Some of these deeds were for the non-payment of taxes. The transcript of the record has not been completed or printed in this case, but for the convenience of the Court we have referred in this brief to the pages of the first part of the record which was filed in this Court on a former appeal.

One from John Simpson, Sheriff and Tax Collector to John Starke, dated 5th of July, 1852, page 28 of the record, and

One from Robert C. Partin to William Mills on the 23d of April, 1872, pages 30 and 868 of the record.

Also certain other deeds, to-wit:

Deed from William Mills to George C. Powell, dated 3d of May, 1872, page 871 of record, and

Deed from George C. Powell to Henry Sanford, dated 27th of October, 1881, page 874 of record.

Deed from George C. Powell to Henry Sanford, dated 15th of November, 1881, page 878 of record.

Deed from Henry Sanford to Trustees of Florida Land and Colonization Company, dated 9th of January, 1884, page 896 of the record.

Deed from Trustees to Florida Land and Colonization Company, dated 2d day of December, 1899, page 883 of the record.

Deed from Florida Land and Colonization Company to Appellee, Wilson Cypress Company, dated May 3d, 1900, page 32 of record.

The Bill also prays for the cancellation of other tax deeds and tax certificates held by said Henry S. Sanford and by other persons named in the amended Bill. The appellants claim to be the heirs at law of one Theresa Rodriquez. The land described in the bill known as the Theresa Rodriquez Grant was originally granted to one Miguiel Marcos on the 18th of October, 1815, and was favorably reported in 1825 for confirmation by the Commissioners appointed by the United States to investigate this class of Grants, and was afterwards confirmed by Act of Congress of May 23d, 1828. The various grounds on which these deeds are sought to be cancelled as stated in Bill of Complaint and found on pages 1-30 of the record.

The appellee stated in its answer several grounds of defense to the Bill of Complaint found on pages 35 to 67, inclusive of the record. Among the other defenses included in the answer were that the Bill of Complaint was barred by laches and barred under the Statute of Limitations of the State of Florida, and by the adverse possession of appellee and those under whom it claims, that such possession of appellee and those under whom it claims was adverse possession for the statutory period as required by the laws of Florida, and also barred the appellant's right to maintain the bill in this cause. The dates of the several deeds sought to be cancelled under the facts in this case establish the defense of laches to

the Bill of Complaint. The deed from John Simpson, as Sheriff and Tax Collector, to John Starke, was executed on the 5th day of July, 1852, more than fifty years before the filing of the Bill of Complaint; the deed from R. C. Partin as Tax Collector to William Mills, dated 23d of April, 1872, was executed and recorded thirty-five years before the filing of the bill; the deed from Mills to Powell was executed and recorded more than thirty-four years before the filing of this bill. Deeds from Powell to Sanford were executed in 1881, twenty-six years before the filing of the Bill and recorded in 1884, twenty-three years before the filing of the Bill; the deeds from Sanford to the Trustees of the Florida Land and Colonization Company were executed and recorded twenty-three years before the filing of the Bill; the deed from the Trustees to the Florida Land and Colonization Company dated 2d day of December, 1899, were executed more than seven years before the filing of the bill and the deed from the Florida Land and Colonization Company to the appellee, Wilson Cypress Company, was executed on the 3rd of May, 1900. The Bill of Complaint in this cause was filed 1st of May, 1907, two days less than seven years from the date of executing of the said deed to the appellee. The Spanish Grant involved in the case was made in 1815 and recorded by the Commissioners for confirmation in 1825, and confirmed by the Act of Congress of May 23d, 1828. The evidence shows that in 1890 persons under whom appellants claim as defendants sought to procure from the General Land

Office of the United States the patent for these lands. No action ever appears to have been taken by the Spanish Grantees, and those claiming under them, of the grant to obtain patent from the United States between the confirmation of the Grant in 1828 and up to 1889, and no action asserting title or right of possession of the land. The history of the proceedings in the Land Department establishes that on the 12th of February, 1894, the Secretary of the Interior ordered a patent to issue and that this was more than thirteen years from the date of the order to the date of the filing of the bill. On the 26th of June, 1895, a patent was issued by the United States to the heirs of Theresa Rodriquez and this was nearly twelve years before the filing of the Bill. The Bill in this case was filed about twelve years after the executing of the patent and within two days of seven years after the executing of the deed to appellee under which appellee claimed, and the bill was filed after the lapse of a great number of years above stated since the other deeds were recorded under which appellee claims.

The appellee alleged in its answer and the evidence establishes that the Bill of Complaint filed by appellee is barred by laches and long delay, and by the abandonment of the property by appellants and by those under whom they claim title. The Bill is also barred under the Statute of Limitations of the State of Florida. The answer of appellee alleges and the evidence establishes that there were many years of actual possession and occupancy of the land by appellee and those under whom it claims title.

The said George C. Powell went into actual occupation and possession of the land in 1872, when it was conveyed to him, and lived upon and occupied the land to 1881, when he conveyed the same to Henry S. Sanford. This period was sufficient under the Statutes of Limitation of Florida to bar the appellants right of recovery. After 1881 Henry S. Sanford and the Florida Land and Colonization Company were in actual possession of the property until that Company conveyed it to the appellee in 1900. The appellee has been in actual possession of the property since 1900 and was in possession of same at the time the Bill was filed in this cause. The character of the possession is shown in the evidence. The appellee in its answer also insisted that certain necessary parties defendant were not made defendants to the bill. That the appellant was in possession at the time the Bill was filed; that the pedigree of the appellants as heirs at law of Theresa Rodriquez had not been sufficiently alleged or proven. The appellants and those under whom they claim have never paid any taxes upon this property; that the taxes were paid by the Florida Colonization Company from the time it acquired title and by the Trustees of that Company from the time of date of the deeds to said Trustees and the appellee has paid the taxes ever since 1900. The appellants in this case and those under whom they claim never paid any taxes or asserted any claim of ownership or any possession or right of possession except the claim of one Martin, an attorney who claimed to be acting for some of the persons under whom complainants

claimed title, and he also asserts that after the issue of the patent he went on the land and appointed an agent, but at that time those under whom appellee claims title were in actual possession.

The said Owens only avers that he remained in the vicinity of the land or made some claim of possession for about a year or a year and a half, in 1896 and 1897. The appellee also insisted that the appellants were barred by estoppel and by long acquiescence in the possession and use of the property by appellee and those under whom it claims title. Further, that under the facts of the case, the Court would presume after this great lapse of time that a deed or grant had been executed by appellants or those under whom they claim title to appellee or those under whom it claims title.

THERE ARE NO FEDERAL QUESTIONS TO BE DETERMINED IN THIS CAUSE AND ALL OF THE FEDERAL QUESTIONS ORIGINALLY RAISED BY THE PLEADINGS IN SAID CAUSE WERE DECIDED IN THE OPINION OF THE UNITED STATES SUPREME COURT HERETOFORE RENDERED IN THIS CAUSE.

This case was heretofore decided by this Honorable Court on the 15th day of March, 1915, and the decision is reported in 236 U. S. Supreme Court Reports, pages 635 to 657, 59 Law Edition, pages 759 to 771, inclusive.

The Supreme Court in its opinion in this cause made a statement of the case and in its opinion

stated the history of this Spanish Grant and of its confirmation and survey. The Court further decided that: "All the conditions of a taxable property existed." The Court in its opinion discusses the effect of confirmation of the grant, its survey and the effect, if any, of a patent of a confirmed Spanish Grant, and then uses this language: "It will be observed from the allegations of the bill which we have taken the trouble to repeat that the foundation of the title of complainants is a grant from Spain which was reported as valid by the Board of Commissioners of the United States, recommended by such Board for confirmation and confirmed by the Act of Congress of May 23d, 1828, to the extent of one league square, to be located by the claimants, subsequently (in 1851) a survey was made under a contract of the Surveyor General of Florida, which has been accepted as the segregation of the land and set forth in the patent, and that the sole basis of the patent is the title so derived and confirmed."

The Court in its opinion further stated: "We have been at pains to cite at length from these decisions to show how little stood in the way of the complete assurance of Complainants title, and that its foundation was the direct confirmation of it by the Acts of May 23d, 1828, and that the grant needed definition only by a survey which was made as we have seen in 1851. This survey was referred to by counsel for complainants, by the Commissioner of the Land Office and the Secretary of the Interior, and in the patent it being made the foundation of the latter."

The Court then refers to further questions involved in the litigation as to the tax sales and the assessment of the land for taxes and further states as to these questions, "their solution depends upon testimony somewhat voluminous and not very satisfactory, of which there is no analysis either by the Master or by the Trial Court, or by the Court of Appeals. "The Court in its opinion also states that there were contentions in the case as to laches of the complainants and that the suit was barred by the Statute of Limitations and as to adverse possession of the property from 1872 to the bringing of the suit by parties under whom defendant claimed title and under the defendant. The Court in its opinion also refers to the fact that it was contended that all during this time, the complainants neither paid nor offered to pay the taxes, that the other parties did, and the defendant paid same from 1890, and defendant had made expenditures on the property; that complainant asserted no claims to the land against the defendant and let twelve years elapse after the patent was issued before bringing this suit. The Court in its opinion stated that the Court below rejected these objections referring to laches, Statute of Limitations, adverse possession, improvements and payments of taxes. This Court in its said opinion referred to the mistakes or errors made by the trial Court in the first trial of the cause as follows: "The Courts below rejected these contentions. The trial Court seemed to have arrived at its conclusion by disregarding the possession whatever it was which was held by defendants

predecessors in the title or its possession prior to the issue of the patent. 'It makes no difference,' the trial Court said, 'what the occupation or possession may have been while the title to the property was in the United States and it is not considered that the possession during such time can be resorted to to determine whether or not the property was after issue of the patent in the actual possession of the defendants through its agent sufficiently to legally bar a right to maintain a bill to remove a cloud from title.'"

This Court in said opinion referring to the language of the trial Court just quoted, states: "We think the learned Court erred in this. The continuity of possession was a factor to be considered. The evidence of numerous witnesses seems to conflict upon the character and extent of such possession, an analysis of which can better be made by the master or the trial Court than by an appellate Court." This Court then stated that these questions of fact were referred to because the Court below had erroneously omitted to pass on a number of important questions. The Court then closed this opinion with the following statement: "And we repeat, a consideration of such testimony should be made in the first instance by the trial Court."

It is thus apparent from the opinion in this case heretofore rendered by the Supreme Court that the Federal questions originally involved were determined and decided in that opinion. The effect of The Grant and its confirmation and survey on all of the questions of fact in the case were decided

and it was determined that the confirmation of the Grant by Congress and the survey of the Grant segregated this land from the Public domain and that it was then subject to taxation and that the defendants claiming it could rely upon the defense of laches by the complainants and that the bar of the Statute of Limitations and by adverse possession and that the payment of taxes by defendants and those under whom they claim and expenditures on the land were all to be considered in connection with the above mentioned defenses. The case was remanded and these questions of fact under the testimony in reference to same were to be passed on by trial Court. These were the questions of fact under the testimony before the District Court as the trial Court on the second trial of the cause under the mandate of the Supreme Court and these were the questions of fact before the United States Circuit Court of Appeals on the second appeal in said cause. The original bill was filed in this cause May 1st, 1907, and the first decree entered by the Trial Court January 13th, 1912, and the first opinion of the United States Circuit Court of Appeals was entered February 4th, 1913, 202 Federal, 742. The opinion of the United States Supreme Court herein above referred to is dated March 15th, 1915, a second decree of the district Court dismissing the bill is dated in July, ~~1925~~, and found in transcript of record pages 1120, to 1123 inclusive. The opinion of the United States Circuit Court of appeals of the 5th Circuit from which the present appeal is taken is dated May 31st, 1924, and is found in the Fed-

eral Reporter, volume 299 pages 261 to 263 inclusive. It will thus be seen that the Appellants in the present appeal are seeking after seventeen years of litigation to have reheard and to retry all of the questions of law and fact that have been pending during this long litigation and all of the Federal questions which have already been determined by this Court in its opinion dated 15th of March, 1915, and in volume 236 U. S. Supreme Court, pages 635 to 657, 59 Law Ed. 759 to 771 inclusive, and to have a second trial upon the question involving the evidence and under the local laws.

OPINION OF THE DISTRICT COURT

The district Court uses the following language in its opinion: "The Supreme Court discusses the evidence and remands the case for findings upon the validity of the tax deeds; upon adverse possession by defendant and its predecessors in title and upon the question of laches. "The District Court discusses the facts of the possession by defendant and those under whom it claims, and the judge in that opinion states: "In view of the character of the land, I think there has been sufficient evidence to establish title by adverse possession in the defendant, and that the actual possession shown of portions of the land under color of title, established title to the whole grant." The opinion of the District Court is also as follows: "I think the claim of plaintiffs is barred by laches. Powell began to live upon the property, and to assert acts of ownership and dominion over it thirty-five years before this suit was brought. For more than fifty years

plaintiffs failed to pay taxes. It is too late now, after so great a lapse of time and after the property has increased many times in value, to seek the active aid of a Court of Equity." It is thus apparent that this decision of the trial Court was based on matters of fact and acts constituting adverse possession and the application of the statutes of limitation and upon the acts of the plaintiffs and those under whom they claim showing they were barred by laches, and that it was too late after this great lapse of time and after the property had increased many times in value to bring and maintain this suit. We submit that the issues on which the case was tried in the second trial in the District Court were issues of fact depending upon the evidence and issues of applying the Florida Statutes of Limitations as local law and that no Federal question was then before the District Court, after the decision of the Supreme Court and its mandate. The case before the United States Circuit Court of Appeals did not present Federal questions and the decision was not upon federal questions.

The decision of the United States Circuit Court of Appeals of the 5th Circuit in this case is found in Federal Reporter, Volume 299, pages 261 to 263 inclusive. That Court stated in its opinion that it was asserted by the appellants in that Court that prior to the issue of patent the land was not taxable and was not subject to be acquired by a tax title or by possession adverse to the appellants and those through whom they claim, and that prior to the date of the patent, the evidence could not properly be considered

in passing on the defense of laches set up by the appellee. The Court further states: "We are of the opinion that contentions dependent upon the just stated proposition have been disposed of by the decision of the Supreme Court. That Court decided that the land was taxable from the date of the survey in 1851; the ground of that decision being that the title relied upon by appellants was vested upon the identification of the land granted by the survey by field notes and official plats hereof were approved by the Surveyor General June 20th, 1851. The Supreme Court in its opinion discussed the defenses based on tax title, adverse possession and laches, but did not pass on those defenses because the evidence in regard to them had not been considered by the trial Court. It remanded the cause for further proceedings in accordance with an opinion which showed that defenses based on tax title, adverse possession or laches, after the title under the grant was vested by the survey of 1851, were available to the appellee after they were found to be duly supported by evidence. The questions whether the title asserted by the bill was prior to the date of the patent subject to be lost by adverse possession, and whether conduct prior to that date of owners of that title properly could be considered and based on the defense of laches are no longer open ones in this Court. Cite Joplin vs. Chachere, 192, U. S., 94; 24 Sup. Ct. 214; 48 Law. Ed. 539; Sanchez vs. Deering (CCA 5th Circuit) 298 Federal, 286. The Court then discussed the facts constituting adverse possession by appellee and those un-

der whom it claims. The Court in this opinion calls attention to the fact that for more than fifty years, prior to the bringing of this suit, the appellants and those through whom they claimed, paid no taxes on the land and that during all that time the land was treated as taxable by the Florida authorities and that it was openly claimed and dealt with by persons claiming under deeds made under sales of the property for taxes. The Court further finds as matter of fact the following: "For more than thirty years immediately preceding the bringing of the suit, appellee and those under whom it claimed, kept the taxes on the land paid up, openly asserted ownership and exercised such dominion and control as made it notorious that ownership of the land was claimed by them. During more than thirty years while the land was so dealt with by parties claiming and carrying the burdens of ownership the appellants and their predecessors did not even make known their claim to the adverse claimants, though during all that time remedies for enforcement of their rights were available, and made no claim at all until after the land had greatly increased in value."

The Court then states in reference to laches in this case as follows: "The evidence warranted the conclusion that by the suit the Court was called on to grant equitable remedies for the enforcement of a claim which for a period longer than an ordinary lifetime was entirely dormant under circumstances indicating the absence of any intention on the part of its owners to assert the ancient and apparently

the long abandoned right against adverse claimants, who successively and openly as owners dealt with the operation of it in the belief of the non-existence of any such rights. We are of the opinion that there was ample support in the evidence for the conclusion that the appellants and those under whom they claimed were guilty of such laches as justifies a Court of Equity in refusing its aid for the enforcement of the claim asserted." A consideration of the opinion of the United States Circuit Court of Appeals establishes that the decision in that Court was based upon questions of fact and of possession constituting adverse possession and of the Statutes of Limitations under the laws of Florida; and that under the facts and the evidence that Court found and determined that the appellants in this case and those under whom they claimed were guilty of such laches that they were not entitled to any relief in the cause. None of the issues before the Court and none of the grounds on which the case was heard and determined were Federal questions, but were questions of local law and questions under the evidence of adverse possession, the Statute of Limitations and the bar of laches. We submit, therefore, that there were no Federal questions in the case before the United States Circuit Court of Appeals and none decided by it, and therefore no Federal questions are brought to this Court under the Appeal from the decree of the United States Circuit Court of Appeals in this case.

ONLY QUESTIONS OF FACT AND OF LOCAL LAW ARE IN THIS CASE

We submit that the opinions of this Court and the District Court and of the United States Circuit Court of Appeals establish that after the first opinion of the Court, there were no Federal questions to be determined by the District Court or by the United States Circuit Court of Appeals and no Federal questions were determined by either of those Courts. That the case before the District Court and the case established by the opinion and decree of the District Court was one of fact under the evidence and under the statutes of the State of Florida, that the case before the United States Circuit Court of Appeals and the decision and decree of that Court were based on these questions of fact and the Statutes of Florida. That the Appeal now pending in this cause in this Court should be dismissed or the decree affirmed because the appellants seek a review of the decisions and decrees of the District Court and of the United States Circuit Court of Appeals on such questions of fact and evidence as to adverse possession, the Statute of Limitations, and the bar of laches, and that this Court will not review the decree of the Circuit Court of Appeals on such questions of fact and evidence and local law.

The Jurisdiction of the Supreme Court in causes heard and determined by the United States Circuit Court of Appeals in a case like this depends on the

existence of Federal questions and Federal questions which were decided by the United States Circuit Court of Appeals. The cases in the United States Supreme Court which we will hereinafter call to the attention of the Court in this brief establish that the questions which were before the United States Circuit Court of Appeals were not Federal questions and that no Federal questions were passed on by the District Court or the United States Circuit Court of Appeals.

FORMER DECISION OF THE COURT IN ITS OPINION HERETOFORE RENDERED INCLUDING A RULING ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

In the decision in this case rendered by this Court hereinbefore referred to the Court says as to Motion made to dismiss that appeal, that the bill "Seeks to quiet the title of complainants to a tract of land commencing in a Grant from Spain depending for its completeness upon the treaty with Spain and laws of the United States and the action under those laws by the act of the land department of the United States and it especially relies on those laws to defeat defendants claim of title and to have it removed as a cloud upon that asserted by complainant." The Court further says that the contentions of the complainants depend upon the laws of the United States, hence the Motion to Dismiss at that time was denied. In this opinion this Court determined and settled all of the Federal questions in the case and remanded the case because it required consideration of the testimony and exami-

nation of local laws and decisions. The District Court so construed the opinion and determined its jurisdiction was to pass on questions involving testimony and involving local laws and decisions and dismissed the bill on grounds arising out of the evidence and under local laws. The case therefore, when it was remanded to the lower Court and when it was decided and determined by the lower Court, was upon issues that did not call for the decision of any Federal questions. The Court below treated these questions as already determined and practically formed no part of the record for further determination or decision. The case when it was heard by the trial Court did not involve a construction of the treaty or the laws of the United States. The cases in which the decision of the United States Circuit Court of Appeals is made final are those which do not arise out of Federal questions or questions involving the construction or application of the Constitution or Treaties of the United States or Federal laws. The jurisdiction in the case of the District Court was originally on account of the existence of Federal questions and on the ground of diversity of citizenship. In this class of cases when this Court on examination of the appeal finds that the Federal questions have already been determined by this Court and its decision has been followed by the trial Court and by the United States Circuit Court of Appeals on the Federal questions, it will not reexamine the general questions of law passed upon by the trial Court and by the United States Circuit Court of Appeals, but will

leave all other questions than the Federal questions as the Circuit Court of Appeals has determined them. Under the Federal Judiciary Act and the Act creating United States Circuit Court of Appeals and amendments thereto, there should be but one appeal upon the merits. In this case the District Court and United States Circuit Court of Appeals have simply followed the decisions of the Supreme Court on Federal questions. This case when it was retried by the District Court and reheard before the United States Circuit Court of Appeals was in very much the condition of the cases where it is held that the decision of the United States Circuit Court of Appeals is final. The jurisdiction of the trial Court (then the Circuit Court) originally was on the ground of diversity of citizenship and also on the ground of questions arising under the Constitution and laws of the United States. In this case the appellants in the cause now in this Court first took their appeal to the United States Circuit Court of Appeals of the 5th Circuit and the cause was there determined upon its merits. An appeal has now been taken to this Court from the decision of the United States Circuit Court of Appeals to review the decision of that Court on questions arising purely upon the evidence and upon local law. This is the character of case that is now in this Court on this Appeal. See cases of Ayres vs. Holdsdorfer, 187 U. S. 590; 47 Law Ed. 315 and 316; Colorado Central etc. vs. Tooke, 150 U. S. 138; 37 Law Ed. 1030. McFadden vs. U. S., 213 U. S. 288; 53 Law Ed. 802. See also Loeb vs. Columbia Twp. 179 U. S. 472; 45

Law Ed. 280. In the case of Ayres vs. Holsdorfer, the Court uses the following language: "In Robinson vs. Caldwell, 165 U. S. 359, 41 Law. Ed. 745, it had been decided that 'it was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals.' " This was affirmed in Leob vs. Columbia Township. It is there observed that the plaintiff in that action could have carried the case to the Circuit Court of Appeals, but had he done so, he could not thereafter have invoked the jurisdiction of this Court upon another Writ of Error to review the judgment of the Circuit Court."

This case after the decision in this Court on Federal questions comes either within the class of cases where jurisdiction is made final on the determination by the United States Circuit Court of Appeals or the class of cases in which the decision of the United States Circuit Court of Appeals has been on general law, and in either event this Court on inspection of the record will dismiss the appeal or decline to reexamine the questions passed on by the United States Circuit Court of Appeals under general law. See also Empire State etc. Co. vs. Henley, 198 U. S. 297; 49 Law Ed. 1058. Robinson vs. Caldwell, 165 U. S 359; 41 Law Ed. 745.

In this latter case, this Court decided: "As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of this Court upon the appeal to it from the

Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court." And in the case of U. S. vs. Jahn, 155 U. S. 109, 39 Law Ed. 87, where the question of the jurisdiction of the United States Circuit Court of Appeals and the effect of the appeal to that Court and of its decision is discussed See also McLish vs. Roff, 141 U. S. 661. This Court in the case of Chicago Junction R. R. Co. vs. King, 222 U. S. page 222, 56 Law Ed. 173, has used language determining what questions this Court will review in passing on the decree of the United States Circuit Court of Appeals, as follows: "That although we have jurisdiction to review, the cause of action, as stated in the pleadings, rested upon the safety appliance law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the Judiciary Act of 1891, 26 Statutes at Large, 826, Chapter 517, U. S. Comp. Statutes 1901, page 488, to submit to the final jurisdiction of the Circuit Court of Appeals. Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below as to the tendencies of the proof. We are of the opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole

duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the Court below in any of the particulars complained of." The Court in that case affirmed the judgment of the Court below without any lengthy opinion on the evidence or minute examination of the evidence.

EFFECT OF THE MANDATE OF THE UNITED STATES SUPREME COURT UNDER ITS FORMER DECISION IN THIS CAUSE.

We submit that the only question which was open for review in this case was whether the District Court had followed the decision and mandate of this Court on the former appeal as to the Federal questions determined in such former appeal. The appeal, if any, upon which a decision could be made as to whether the District Court had carried out the mandate was one that should have been brought directly to this Court. The question as to whether the District Court properly construed and properly carried out the mandate of this Court must be determined on a new appeal to this Court or upon a mandamus of this Court directed to the lower Court to enforce the mandate. If a new appeal were taken, it must be to this Court, or must have been certified by the District Court to this Court, if it involved the jurisdiction of the District Court to construe the mandate. The Federal Judiciary Acts provide that any appeal involving the jurisdiction attempted to be exercised by the District Court and its juris-

diction is drawn in question then that must be determined on appeal certified direct to the Supreme Court. The appellants if they conceived the District Court had improperly construed the mandate of this Court or had refused to follow the mandate in applying the law on Federal questions, should have had that question certified to this Court direct, or should have appealed to this Court, or should have brought mandamus proceedings in this Court to construe and enforce the mandate. See the case of Re: Sanford Fork & Tool Co. et al, 160 U. S. Supreme Court Reports, pages 249, 251; 40 Law Ed. pages 414, 416.

All of the other questions involved in the appeal from the decree of the District Court to the United States Circuit Court of Appeals were questions of general law or under the local laws of Florida. In this case the appellants first appealed from the decree of the District Court to the United States Circuit Court of Appeals of the 5th Circuit, and their present appeal is now to this Court, and they have attempted in that appeal to have reexamined the Federal questions involved in the case and whether or not the District Court had properly construed or carried out the mandate of the Supreme Court, and also all of the questions arising under general law and under the evidence. The Federal questions had already been determined by the former decision of the Supreme Court in this case. The questions as to whether or not the mandate had been properly construed and carried out should have been tested by direct proceedings in mandamus or by having the

case certified as a matter of jurisdiction to this Court, or by a new appeal on the ground that the case still involved rights under the Constitution, laws and treaties of the United States, but the appellants took their appeal to the United States Circuit Court of Appeals on all of the questions and sought there to have examined the decree of the District Court. A correct construction of the Federal Judiciary Acts does not authorize a second appeal upon the merits where the only questions as shown by the record which were heard and determined by the District Court and by the United States Circuit Court of Appeals, are questions of fact under the evidence and under general law or local laws of Florida.

The provisions of the Judiciary Acts under the laws of the United States which are applicable to this case and which establish the jurisdiction in cases appealable direct to the United States Supreme Court and cases in which the decree of the United States Circuit Court of Appeals, is made final are as follows:

Judicial Code, Sec. 238: "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Con-

stitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Judicial Code, Sec. 241: "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs." 36 Stat. at L., 1157, Chap. 231, Comp. Stat. sec. 1218, 5 Fed. Stat. Anno. 2d ed. p. 877." Act of March 3d, 1891, 26 Statutes at Large, 826, Chapter 517 (Comp. Stat. sec. 1108, Title "Judiciary") Sections 5 and 6, 25 Stat. at L., page 693, Chapter 236. Judicial Code Sections 238, 241. As to this case involving only questions of fact, this Court in the case of Bodkin vs. Edwards, 255 U. S. 221; 65 Law Ed. 595, states as follows: "The case, as presented here, turns essentially on questions of fact. Both Courts below, on a review of the evidence, have found the facts in the same way. This Court, under a settled rule, accepts such concurring findings, unless clear error is shown." This Court in the case of U. S. vs. Camou, 184 U. S. 572, 46 Law Ed. 695, "Upon this second appeal we have only to consider whether the Court of Private Land Claims reached its final decree in due pursuance of the previous opinion and mandate of this Court. The decision there made is the law of

the case, and is not open for reconsideration in the subsequent appeal." The Court further stated: "That it is the settled law of this Court that, after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined on the second."

We therefore submit that this appeal should be dismissed or the Court should decline to reexamine these questions determined on general law or local law and without further argument affirm the decree of the United States Circuit Court of Appeals, and that the motion of the appellee to dismiss the appeal, or that the same be affirmed, should be granted.

J. C. COOPER and H. C. CLARK,
Solicitors and Counsel for Appellee.

APPENDIX

Section 1718, page 700, of General Statutes (Sec. 1287 of Revised Statutes). *Action for the recovery of real property.*—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within seven years before the commencement of such action.

Section 1719, page 700 of General Statutes (Section 1288 of Revised Statutes). *Actions founded on the title to real property.*—No cause of action or defense to an action founded upon the title to real property, or to rents, or to service out of the same, shall be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose titles the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within seven years before the accruing of the right of action or defense in respect to which such action is prosecuted or defense made, or unless it appear that the title to such premises was derived from the United States or the State of Florida, within seven years before the commencement of such action; and the period of limitation shall not begin to run until the passage of the title from the State or the United States.

Section 1720, page 700 of General Statutes (Section 1289 of Revised Statutes). *Possession by legal*

owner presumed.—In every action for the recovery of real property, or of the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for seven years before the commencement of such action.

Section 1721, page 700, of General Statutes (Sec. 1290 of Revised Statutes). *Adverse possession under color of title.*—1. Continued occupation for seven years required.—Whenever it shall appear that the occupant, or those under whom he claims, entered into possession of premises under the claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment for seven years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

2. *Definition of possession and occupation required.*—For the purpose of constituting an adverse possession by any person claiming a title founded

upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied, in the following cases:

1. Where it has been usually cultivated or improved.

2. Where it has been protected by a substantial enclosure.

3. Where (although not enclosed) it has been used for the supply of fuel, or for fencing timber for the purpose of husbandry, or for the ordinary use of the occupant; or

4. Where a known lot or single farm has been partly improved, the portion of such farm or lot which may have been left not cleared or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

Section 1725, page 703, of General Statutes (Sec. 1294 of Revised Statutes). *Limitations.*—Actions other than those for the recovery of real property can only be commenced as follows:

* * * 4. *Within Four Years.*—Any action for relief not specifically provided for in this chapter.

IN THE

Supreme Court of the United States

October Term, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL,
Appellants,

vs.

WILSON CYPRESS COMPANY,
a Corporation,
Appellee.

Protest of Appellee to Appellants' Motion to Hear Case upon Six Copies of Former Record, Etc.

Appellants' motion that this cause be heard upon six copies of the chief part of the record must be considered as supplemental to appellants' motion presented to the Court one year ago. The clear implications of appellants' former motion are that an ample printed supply of this chief part of the record was available, and to reprint would merely and unnecessarily duplicate printing costs. Had the court then been aware of the facts which appellants now present, the Court, under its rules, would have denied the motion. Were this not so, then every successful petitioner for a writ of certiorari would follow the granting of the writ with a motion to hear the case on the ten copies of the record which accompanied the petition.

Therefore, it now appears that the granting of appellants' former motion was improvident, under the rule announced in *Furness, Withy, & Co. vs. Yanz-Tsze Insurance Association*, 242 U. S. 430, 61 L. Ed. 409, wherein it is said:

> "The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation of the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever, in the progress of the cause, facts develop which, if disclosed on the application, would have induced a refusal, the court may, upon motion by a party, or *ex mero motu*, dismiss the writ."

The rules of this court require *appellants* to supply a sufficient number of printed copies of the record for the use of the court, and also for the use of counsel for both parties. This is a duty resting upon an appellant.

An appellee is under no such obligation. For an appellant to move that counsel for appellee be required to deliver up their office copy of a former record in order to relieve appellant from complying with the established rules of this court, is without merit, not in accordance with law, and will not appeal favorably to the Court.

Appellants' new motion is *a belated effort* to overcome their failure over the period of an entire year even to attempt in any particular to meet the rules of this court governing the printing of transcripts. The motion now presented by appellants was not served upon counsel for appellee the requisite length of time previously to presenting the motion to the court. This service was not made until ten days after counsel for appellants had been served with the two motions of appellee, and briefs

in support thereof, that the appeal be dismissed or an order of affirmance entered. The conclusion is apparent, that *appellants' motion is an attempt to counteract the two motions of appellee previously served.*

Appellee protests the filing or consideration of this motion of appellants. We submit that if any consideration be given the motion, the necessary result will be to revoke the order of court of October 13, 1924, permitting the case to be heard on a limited number of printed transcripts, upon the ground that such order now appears to have been improvidently entered.

Respectfully submitted,

J. C. COOPER,
HENRY C. CLARK,
Solicitors and Counsel for Appellee

SUPREME COURT OF THE UNITED STATES.

No. 184.—October Term, 1925.

Enrique del Pozo y Marcos et al., Appellants, *vs.* Wilson Cypress Company.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[November 16, 1925.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to quiet title to a confirmed land grant in Florida. The plaintiffs claim as heirs of the original grantee. The defendant claims under tax deeds, and also asserts that the plaintiffs are barred from maintaining the suit, first, by adverse possession on the part of the defendant and those through whom it claims for the period fixed in the local statute of limitation, and, secondly, by inexcusable laches.

The grant was made in 1815 by Spain to Miguel Marcos, purported to cover 5,500 acres, and described the land in terms which made a survey essential to give precision to its boundaries. There was no survey during the Spanish dominion. After the cession to the United States, the heirs of the grantee presented a claim for confirmation to commissioners charged by Congress with the duty of examining and reporting on such claims. The commissioners found the grant valid and recommended it, with others, to Congress for confirmation. The report stated that the grant was without any condition. 4 Am. State Papers, Duff Green Ed., pp. 276, 283, 471.

By the Act of May 23, 1828, c. 70, 4 Stat. 284, Congress acted on the commissioners' report by confirming this and other claims, with the general qualification that if any claim exceeded the number of acres in a league square the confirmation was limited to such acreage, to be located by the claimants, within the original grant. That and other acts contemplated that the claims should be surveyed by way of precisely defining their boundaries and of connecting them with the public land surveys. Because of delay in making the surveys, possibly resulting from inaction on the part

of claimants, Congress, by the Act of June 28, 1848, c. 83, 9 Stat. 242, directed that the work proceed as soon as practicable. Early in 1851 this claim was surveyed under the direction of the Surveyor General, and on June 20 of that year the survey received the approval of that officer. As surveyed the claim contained 5,486.46 acres.* In 1889 the grantee's heirs applied for a patent for the claim as surveyed. The application was denied by the Commissioner of the General Land Office on the mistaken theory that the claim as surveyed was more than a league square and therefore more than was confirmed by the Act of 1828. On an appeal from that ruling the Secretary of the Interior recognized that a league square, in the sense of the confirmatory act, comprised 6,002.50 acres and directed that a patent issue for the claim "in accordance with the survey." 18 Land Dec. 64. In 1895 a patent was issued under that direction.

The tax deeds under which the defendant claims were issued—the earliest in 1852 and others before 1872. The one of 1852 may be put out of view. The plaintiffs say in their bill that the others "are fair upon their face" but otherwise invalid. The bill contains a like statement respecting the mesne conveyances whereby the defendant succeeded to the tax title.

This suit by the heirs was begun in 1907. The present appeal is the second one to this Court.

Originally the District Court and the Circuit Court of Appeals ruled that the title was in the United States, and the land not taxable, until the issue of the patent, and therefore that the tax deeds, all of which preceded the patent, were absolutely void and did not give even color of title. In that view the District Court gave and the Circuit Court of Appeals affirmed a decree for the plaintiffs, without considering the conformity of the tax proceedings to the local law or the questions arising out of the evidence bearing on the defenses of adverse possession and laches. On the first appeal to this Court that view was disapproved and the decree reversed. 236 U. S. 635. In keeping with prior decisions this Court held, in substance, that—

1. The purpose of the confirmatory Act of 1828 was not to create a new right but to recognize, in fulfilment of treaty obligations, a right conferred by Spain while the land was under her dominion;

*In some parts of the record the acreage is mistakenly given as 5,426.82.

2. As the grant contained a less acreage than a league square, the confirmation by that Act was subject only to a needed survey giving precision to the boundaries of the grant;

3. When the survey was made and received the approval of the Surveyor General the confirmation was complete and the land was thenceforth effectively separated from the public domain and subject to the taxing power of the State;

4. The survey did not require the special approval of the Commissioner of the General Land Office, for under the law and practice of that period the approval of the Surveyor General sufficed.

5. The patent was in the nature of a convenient muniment or record of the confirmation already effected by the Act of 1828 and the approved survey rather than a conveyance speaking from the date of its issue.

The cases of *Beard* v. *Federy*, 3 Wall. 478, 491, and *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344, were cited in support of the last proposition and were pertinent; but the proposition has further and special support in other cases, where rights based on tax sales, adverse possession, etc., occurring after a like legislative confirmation and before the issue of patent, were upheld, such as *Langdeau* v. *Hanes*, 21 Wall. 521, 529; *Morrow* v. *Whitney*, 95 U. S. 551, 554, 555; *Joplin* v. *Chachere*, 192 U. S. 94.

On the first appeal this Court did not pass upon the question of the conformity of the tax proceedings to the local law, nor on those arising out of the evidence bearing on the defenses of adverse possession and laches. They had not been considered in the courts below and were of a kind that should be examined and determined in the first instance by the District Court and then, if need be, by the Circuit Court of Appeals. The decree of reversal was so framed as to require that this course be taken.

When the case got back to the District Court it was heard anew on the record before made. That court found that the defenses of adverse possession and laches were well taken in fact and in law, and accordingly entered a decree dismissing the bill on the merits. The Circuit Court of Appeals affirmed that decree. 299 Fed. 261. The plaintiffs then brought the case here on the present appeal.

Various motions have been submitted on briefs. One by the appellee asks that the appeal be dismissed as taken where an appeal was not admissible, or in the alternative that the decree be affirmed

on the ground that the questions presented are so unsubstantial as not to need further argument. See rule 6, par. 5, 222 U. S. appendix and 266 U. S. appendix.

The motion to dismiss must be denied. The appeal was taken under sections 128 and 241 of the Judicial Code as existing when the decree of affirmance by the Circuit Court of Appeals was entered, and is not affected by the subsequent Act of February 13, 1925, c. 229, 43 Stat. 936. Section 128 provided that the decisions of the Circuit Courts of Appeals in certain classes of cases should be final, in the sense of being not reviewable by this Court on writ of error or appeal; and section 241 provided that the decisions of those courts in other cases should be subject to such a review where the matter in controversy, exclusive of costs, exceeded $1,000. This suit was not within any of the classes named in section 128, and the matter in controversy exceeded $1,000, apart from costs. Therefore the suit was one in which an appeal was admissible.

The motion to affirm is well taken. A reference to the questions presented and to what is plainly shown in the record will make this clear.

The appellants seek to reopen the questions determined on the first appeal. A full hearing was had at that time. The questions were not novel but covered by prior decisions. As a result of the hearing those decisions were reaffirmed and applied. There was also a petition for rehearing, which was denied. In this situation the questions reasonably cannot be regarded as now debatable.

The contention is made that the decision on that appeal proceeded on the assumption that the survey was approved by the Surveyor General in 1851, whereas according to the record the approval was given shortly before the patent issued, which was in 1895. But the record is plainly otherwise. It contains a certified copy of the original plat of the survey, as made in January, 1851, by Marcellus A. Williams, deputy surveyor; and the plat bears an endorsement signed by the then Surveyor General showing that he examined it, compared it with the field notes, and approved it, June 20, 1851. In addition, the patent recites that the description there given of the land was "taken from the approved field notes" of Williams' survey made in January, 1851. True, the patent also refers to a descriptive plat and notes "authenticated and approved" by the Surveyor General shortly before the date of the patent; but it is

obvious from the patent and other parts of the record that the descriptive plat and notes so mentioned were made up from the approved survey of 1851 merely as a means of providing a suitable and convenient description of the land for insertion in the patent. Their authentication and approval by the then Surveyor General amounted to no more than a certificate by him that they were accurately taken from the survey made and approved in 1851, as shown on the records of his office. See *Joplin* v. *Chachere, supra,* 102, 107.

A further contention is that there could be no laches, nor any adverse possession, prior to the issue of patent, because the claimants were prohibited by the Act of March 3, 1807, c. 46, 2 Stat. 445, from exercising acts of proprietorship until their claim was "recognized and confirmed" by the United States. A complete answer to this is that their claim was both recognized and confirmed by the Act of 1828, and the confirmation became effective when the claim was surveyed and the survey approved in 1851. The subsequent patent, although serving as a convenient muniment of title as confirmed, added nothing to the force of the confirmation. *Langdeau* v. *Hanes, supra,* 530, and other cases before cited.

Reliance is also had on a provision in the local statute of limitation declaring that, as respects lands derived from the United States, the period of limitation should not begin to run "until the passage of the title" from the Government. The answer to the last contention is equally good here. Such title as the United States possessed passed to the claimants when the confirmation became effective through the approved survey. The cases just cited are conclusive on this point.

Lastly, complaint is made of the findings of fact sustaining the defenses of adverse possession and laches. The courts below concurred in these findings and explained them in considered opinions. The record shows with certainty that the findings had very substantial support in the evidence. This Court accepts concurrent findings with such support. *Morewood* v. *Enequist,* 23 How. 491, 495; *Stuart* v. *Hayden,* 169 U. S. 1, 14; *National Bank of Athens* v. *Shackelford,* 239 U. S. 81, 82; *Yuma County Water Ass'n* v. *Schlecht,* 262 U. S. 138, 146; *United States* v. *State Investment Co.,* 264 U. S. 206, 211.

No question is presented which can be regarded as debatable in this Court, so there is no need for holding the case for further argument.

Decree affirmed.